CASE AND COMMENT

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# Conservation and New Nationalism

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[Professor Fairchild argues in favor of the national control of national property for the benefit of the people, and discusses the origin and growth of the conservation movement, which forms one of the demands in the progressive platform of the new nationalism, which is an outgrowth of the modern world-wide trend towards democracy.—Ed.]

THE American people are the most extravagant and wasteful that ever inhabited the earth. This statement is absolutely true. In a single century, with the aid of science and invention, we have so drawn on the natural resources of a great continent as to justify alarm for the future. In this exploitation America has not been alone, for ten years ago Alfred R. Wallace characterized the work of the nineteenth century as the "plunder of the earth." But this nation is the most guilty.

### Waste of Natural Resources

The early settlers on the eastern border of the continent had to remove the forest before they could make farms, and the notion that cutting timber was improvement of the land has been inherited, so that ignorance and greed have destroyed the forests even on areas entirely useless for any other purpose. A large proportion of the anthracite, the finest fuel in the world, has been wasted by greedy methods of mining by corporations chartered for public service as common carriers, and not for mining. The stores of rock oil and rock gas have been very largely thrown away by our absurd system of allowing individuals to ignorantly and carelessly pierce the earth at their will. The most serious waste, though not the most evident, has been the robbing of the soil by ignorant and avaricious methods of agriculture. The decline in soil fertility has produced a "dry rot" in rural communities, shown by the loss in population. The most serious economic problem of the future is the food supply. The farmer is going to find it difficult to produce supplies at prices which the city dweller can afford to pay. One cause of present high prices is exhaustion of nature's resources.

In this indictment we must not forget the great destruction of animal life and great waste in human life, through poor sanitation, child labor, overwork, impurities in foods and drugs, and especially by accidents. The latest report of the Interstate Commerce Commission states that in the year ending June, 1910, the railroads of the United States killed 3,804 persons and injured 82,374, this being 1,013 more killed and 18,454 more injured than in the previous year. Our capitalistic system has made goods dear and men cheap.

### Waste Due to Individualistic System

Our individualistic system is responsible for the waste. It is absurd to allow, for example, any man or group of men who happen to occupy a bit of land to unrestrainedly bore into the deep strata,

and permit the valuable hydrocarbons that have been stored through millions of years of geological processes to escape unused, perhaps merely to boom real estate; or to permit the slashing and burning of forests on rocky mountain slopes. And it is equally absurd when the guilty party is a great and rich corporation. The "public-be-damned" way of treating the products of nature is unscientific, unaltruistic and undemocratic. It is reversion to the primitive conditions of civilization. We must come to recognize that natural resources, as the land, coal, oil, and gas, phosphate, iron, water power, belong to all the people, and should be so used as to serve the general good.

### Origin and Growth of Conservation Movement

These abuses and dangers have long been recognized by thoughtful men, but the people as a mass were indifferent until President Roosevelt sounded the alarm. A group of scientific men, partly in the public service, had the confidence of the President, and with the aid of their expert knowledge he initiated a programme of conservation of the nation's resources within the public domain. To these men and to Mr. Roosevelt the country owes a debt that future generations will better appreciate. The President used his power as chief executive to withdraw public lands holding valuable forests, coal, minerals, and water-power from immediate sale or occupation, and advised Congress to pass protective legislation. In some cases where his authority to make withdrawals was in doubt, he gave the people the benefit of the doubt. Later, Secretary Ballinger took the position that withdrawal must not be made unless the law specifically authorized it,—an attitude which played into the outstretched hands of exploiting interests. We can judge which position was the more noble and patriotic, as now all the withdrawals have been fully legalized.

LOWER FALLS OF THE YELLOWSTONE
310 feet high, Yellowstone National Park, viewed from red rock halfway down the canyon walls.

The objection made by the opponents of the conservation programme, that the nation's resources are being locked away from the present generation in order to serve only later generations, is the cry of a baffled plunderer. "When the movement began to tell, it developed without delay that the one great obstacle to practical progress lay in the political power of the special interests. Every effort to conserve any natural resource for the general welfare was met by legislative agents of the

men who wanted to exploit it for their private profit. The effort to get things done in conservation taught clearly, unmistakably, and with little delay that, so long as the political domination of the great business interests endures, corrupt control of legislation will carry with it the monopolistic control of natural resources." (Gifford Pinchot.)

The Pinchot-Ballinger controversy is merely a skirmish between the advance guards of the two hostile forces, the people and the predatory interests; but it has served excellent purpose in awakening and educating the people and in stimulating action. Thus far the champions of the people have won. The coal of Alaska, probably of enormous value, has been safeguarded, thanks to the vigilance of Glavis and Pinchot; the right to the coal or ores does not now go with the agricultural possession of the public lands; and President Taft urges that laws be passed authorizing the leasing under rigid conditions, instead of sale, of the coal lands and water-power sites on the public domain.

### National Control of National Property

The question of national control of national property does not affect New York state, because we have no government land within our borders. There could be no national property in any of the thirteen original states. In the Southern and Middle West states the nation has parted with most of its land. But in the far West vast tracts of land, with forest and wealth of minerals and water-power, are yet owned by the people at large. The great forest reserves and national parks, as well as all of Alaska and the Philippines, Hawaii, and Porto Rico, are national property.

### Control of Water Power

The national control of the coal and other mineral wealth does not involve any serious difficulties, but the handling of the water-power rights presents a legal problem. The foes of conservation join with the honest believers in state control in claiming that the water power is a function of the streams and should belong to the states; while the conservationists hold that rights to the water power go with the land or the power sites. In a very comprehensive and judicial address at the Conservation Congress, President Taft presented the argument for both sides without giving a definite opinion. Legally the mountain states have no claim on any national property within their confines, but for even justice they might ask that, since the Eastern states long ago acquired all the public lands within their borders, these states should not demand a share in the domain now withheld. Apparently there must be some compromise, and a co-operation of the national government with the mountain states in the handling of the water power, but it should never be turned over wholly to the states. None of the states have properly safeguarded the property and rights of the people, but have let them fall a prey to selfish business interests. As Roosevelt said in his splendid address at the Conservation Congress, "One of the prime objects of those who are grasping and greedy is to avoid effective control either by state or nation; and they advocate at this time state control simply because they believe it to be the least effective." Capitalistic interests founded on special privilege dread the increase of Federal power.

Trusts and monopolies now practically own all the coal and oil that have been discovered outside of the public lands; most of the timber, most of the water power, and the greater iron deposits. With their absolute control of all transportation they are now able to dictate the prices of food supplies and of many of the necessaries of life. To create an absolute plutocratic tyranny it is only necessary that the interests should obtain control of the undeveloped resources on the public domain. Future industries will need to utilize all the water power. The capitalists have appreciated this, and have already acquired most of it.

### Beneficiaries of Conservation

The vital problem before us "is not simply whether our natural resources shall be conserved, or whether they shall be destroyed. The ultimate question is this—for whom shall the natural re-

STONE MOUNTAIN NEAR ATLANTA, GA.

The ax and fire have removed the forest; and the heavy rains have removed the soil which once covered the larger part of this rocky knob. Neither wealth nor time can restore fertility to this mountain.

sources be conserved and who shall reap the benefit? On one side are the highly organized forces which have fattened upon unregulated monopoly, and which are striving for government by money for profit. On the other side are the plain American citizens who are striving for government by men for human welfare. The real reason why conservation has the support of all the people is that it is a moral issue." (Pinchot.) Beneath the questions relating to conservation lie the fundamental problems of human life and social justice.

Every great struggle for human freedom is at the basis economic. We are now fairly launched on a bitter fight for real democracy in America,—in other words, for economic justice. The conservation movement, led by Pinchot, Garfield and Roosevelt, is the very heart of the battle.

### New Nationalism

The "New Nationalism" is another name for the popular movement toward the people's control of the necessities of life and of their own business. Conservation is only a part of the great world-wide movement toward democracy. It is a movement that seeks to restore to the people the control of their own property and to conserve the resources of nature for the benefit of present and coming generations. The difficulty that conservation meets is the same that stands in the way of honest politics,—namely, selfish private interests and the power of capitalism.

As the name "New Nationalism" was given by Roosevelt, the thing it stands for is roundly abused, as should be expected, by the monopolistic interests and those who personally oppose him. But many people who are friends of democracy, or pose as such, ignorantly rant against the name. Let us find what it really means.

In his Osawatomie speech Roosevelt enumerated eighteen planks in his progressive platform, which he then aptly named "New Nationalism." These are as follows, stated concisely:

1. Elimination of special interests from politics.

2. Complete and effective publicity of corporation affairs.

3. Prohibition of use of corporate funds, directly or indirectly, for political purposes.

*Photo by Brown Bros., N. Y.*

Mt. Carbon, Alaska, in the Guggenheim Coal field, said to be a nearly solid mass of anthracite.

4. Government supervision of the capitalization of all corporations doing an interstate business.

5. Personal criminal responsibility of officers and directors of corporations.

6. Increased power of the Federal Bureau of Corporations and of the Interstate Commerce Commission.

7. Single schedule tariff revision.

8. Graduated income and inheritance taxes.

9. Readjustment of the national system of finance so as to prevent panics.

10. Efficient army and navy sufficient to insure peace.

11. Use of natural resources for the benefit of all the people.

12. Extension of work in agricultural bureaus and schools so as to consider all phases of farm life.

13. Regulation of the terms and conditions of labor by workmen's compensation acts; regulation of child and female labor; sanitation laws; and use of safety appliances.

14. Clear development of authority between national and state governments.

15. Direct primaries, associated with corrupt practices acts.

16. Publicity of campaign contributions before elections.

17. Prompt removal of unfaithful and incompetent public servants.

18. Prohibition of national officials performing any service for or receiving any compensation from interstate corporations.

Surely no true friend of democracy and of honest government can fairly object to a single one of these items, yet we hear the most violent condemnation from prominent men of both parties, especially in the east.

These violent critics would say that to the eighteen items given above there should be added three more to represent the substance of Roosevelt's declarations on other occasions, namely: (1) Expansion of the power of the national executive; (2) disparagement of the United States Constitution; (3) disparagement of the United States Supreme Court.

### Centralization of Government

Unquestionably the growth of democracy in a great nation requires centralization of government; but the people's gov-

ernment, not the trust's government. The error of most writers who oppose the rule of the people is that they carry over into the democratic or socialistic *regime* the wrongs or abuses of the present undemocratic government. Local machinery of government cannot properly do much of the work that it now attempts to do, much less the expanding affairs of nationality. State lines are merely imaginary, and the larger part of the life and commere of the people has no concern with locality or state. "The United States IS!" These opening words of the most eloquent address of Senator Beveridge at the Conservation Congress were approved with tumultuous applause. The laconic statement expressed the overwhelming sentiment of the Congress.

Could we delegate the work of our state to the counties? The whole trend is the opposite. We are properly concentrating the supervision of large affairs in the hands of state officials and state bureaus. It is in the line of efficiency, economy, and honesty. People who argue against the centralization necessary to meet the demands of modern conditions either forget that the railroad and telegraph have been invented, or they are not believers in real democracy. Matters which concern all the people of the nation, unlimited by imaginary boundaries of political divisions, should be handled by national agents. Think of what is already nation-wide; the postal and revenue service; the Geological Survey; the Mining Bureau; the reclamation work; the pure food inspection; interstate commerce control; postal service banks, etc., etc., and the list is growing. Would any well-wisher of the American people have these functions relegated to the states? Then why not a national income tax, and firmer control of interstate corporations? These two propositions cover all that is positively centralizing in Roosevelt's platform. But even that is quite sufficient to offend the owners and friends of the corporations.

### Commercial Centralization

The whole trend of civilization is toward centralization or consolidation. It is the natural result of the socializing effect of easy communication and transportation, with the growth of altruism and solidarity. Governmental functions must be centralized to cope with the centralization of the commercial world. Listen to so conservative a democrat as Woodrow Wilson: "The organization of business has become more centralized, vastly more centralized, than the political organization of the country itself. Corporations have come to cover greater areas than states, have come to live under a greater variety of laws than the citizen himself, have excelled states in their budgets, and loomed bigger than whole commonwealths in their influence over the lives and fortunes of entire communities of men. Centralized business has built up vast structures of organization and equipment, which over-top all states, and seem to have no match or competitor except the Federal government itself, which was not intended for such competition. Amidst a confused variety of states and statutes stands now the colossus of business,—uniform, concentrated, poised upon a single plan, governed not by votes but by commands, seeking not service but profits. . . . The great organization of business seemed to play with the states, to take advantage of the variety of the laws, to make terms of their own with one state at a time, and by one device of control or another to dominate wherever they chose, because too big to be dominated by the small processes of local legislation."

This gigantic menace of big business would seem to demand adequate Federal powers of control, but Wilson says "we do not believe the invention of Federal powers either necessary or desirable," and inconsistently argues for state control of what the states have been unable to control.

### Inadequacy of Constitution

Concerning the national Constitution there is a sort of unthinking reverence that verges on superstition, and a pride that is not worthy. With all due honor to its builders, it must be said that this fundamental law was drafted before the development of modern science, inven-

tion, and industry; before there were any steamships, railroads, or telegraph; before there were any great cities in America, and before the greedy giant of Big Business had crawled out of his lair. It was devised in revolt from monarchy, but it did not provide for real democracy, and it compromised on the deepest principle of democracy, human freedom. It was framed to meet the conditions of a civilization very unlike that in which we live. In the same address quoted above, Woodrow Wilson says, speaking of Federal control of the colossus of business: "But this intimate task of regulation was not one for which its Constitution had furnished it with actually suitable or entirely adequate powers and authority."

### Criticism of Supreme Court

The Washington Times has wittily said: "Considering that we can't do anything else to the Supreme Court, we surely should have the privilege of criticizing it." And have we not the right of criticism, and does the court not deserve criticism?

We are suffering from too much "interpretation" of law; too much judge-made law, which is as inconsistent for democracy as king-made law.

### Democracy of New Nationalism

The New Nationalism is a part of the march of progress, a partial awakening of the spirit of democracy. It means a return of government by, of, and for the people. It means the taking of political power and privilege from the special interests. It means the people doing their business in their own way, for their own good.

This democratic movement has several steps: (1) Practically all the states now have a secret ballot and corrupt practices laws. (2) In some form nearly all the states have a system of direct nominations. We are now growing into the third stage. (3) Direct legislation by the initiative and referendum. This most important step has been taken by nine states, Maine, Michigan, Missouri, Arkansas, Oklahoma, South Dakota, Montana, Nevada, and Oregon.

A fourth step (4) is the power of the people to remove inefficient or derelict public officers, and already in five states the dominant political party has given platform pledges for the reform.

These four cornerstones of democratic government, direct nominations, initiative, referendum, and the recall, are naturally accompanied by a simple, direct, and responsible municipal government, and already one hundred and fourteen American cities are working, with surprising success, under the system of Commission Government.

### Industrial Revolution

This politial revolution is in cause and effect an industrial revolution, the people taking into their own hands the control of the sources of wealth. A partial regulation of the means of transportation now generally prevails, and the public control of all public utilities is rapidly extending. Special privilege to exploit the people should be wholly stopped, for in a democracy special privilege is immoral. Not only in the matter of public service is the power of capital being curtailed, but also in industrial ways, as in mining and water power. The certain lowering of the tariff will take from greedy business another source of exorbitant profit. Truly, the divine right of riches is passing away, like other forms of oppression. Doubtless, since human nature cannot greatly change, the strong will ever seek to profit by the labor of their weaker fellow men, and ideal justice with equal opportunity may never come; but the people will sometime cease to give license and encouragement to the selfish strong. What America specially needs is to train the young in a new ideal of life; to displace our selfish individualism and egotistical ambition by a sentiment of brotherhood and generous altruism.

# The Twilight Zone

BY HENRY C. SPURR, Esq.,
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[In this article Mr. Spurr considers that undefined legal borderland known as the "Twilight Zone," and discusses the proposed extension of Federal power by construction into its domain.—Ed.]

ANY excuse will do for a tyrant, is the moral of the old fable, but necessity has always been the popular one. Acts of usurpation and flagrant disregard of binding law have generally been justified on the plea of the common good. The day of tyrants has, of course, gone by, but we still have with us a large body of citizens deeply interested in the common good, many of whom are chafing under the restraints of the Federal Constitution because it happens to stand in the way of certain of their activities for the general welfare. As the Constitution does impose some formidable obstacles to the extension of Federal power in certain directions, and as easy amendment has not been provided for, we are beginning to hear as much in these days about the so-called unwritten Constitution as the palladium of popular rights, as we once did of the unwritten law in the defense of homicide.

### Substitution of Unwritten for Written Law

The written law under the ban at the present time is to be found in the 10th Amendment to the Constitution, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The unwritten law which it is sought to substitute for the written law through executive action, through legislation, and through judicial interpretation and construction is that the United States has all the powers of national sovereignty not expressly denied. The necessity pleaded for supplanting the written law by the unwritten law is the difficulty of amending the written law, and the supposed fact that the court decisions have left certain gaps between Federal and state powers which must be filled up in the interest of the common welfare,—a sort of twilight zone, a "neutral ground in which neither state nor nation can exercise authority, and which would become a place of refuge for men who wish to act against the interests of the community as a whole."

### Inherent Federal Powers

The doctrine that the United States has all the powers of national sovereignty not expressly denied under the Constitution is derived by the advocates of this new school from decisions of the Supreme Court of the United States justifying the exercise of certain powers of the Federal government, on the ground that they are inherent in the United States as a sovereign nation. While the Supreme Court has announced the doctrine from time to time, that the general government is one of enumerated powers, and can exercise no authority not expressed or implied in the Constitution, it is idle to deny that authority for the exercise of certain powers held to belong to the general government is not to be found under any one of the express constitutional powers or powers that may be implied therefrom, but results by implication from a combination of these express powers; in other words, from the inherent powers of the United States as a nation. The acquisition of territory has been justified, for the most part, under the treaty or war making powers granted to the general government; but certain territory has been acquired by discovery or settlement, and the acquisition of such territory could have been justified only on the ground that the United States has inherent power as a nation to acquire territory in such a manner.

It does not follow, however, that the recognition of the fact that the United States is a sovereign nation requires the courts to hold that it has all the powers as such not expressly denied in the Constitution. The sovereign or ruling part of every state has two aspects, the external and the internal. In its external sovereignty, the state or nation is independent of all control from without; and in its internal aspect, it is paramount over all action within. When component states are equally united, their external sovereignty rests in no one of them, but in the government which results from their combination. [1] While certain of the powers expressly forbidden in the Federal Constitution to the individual states relate to acts of external sovereignty, it is doubtful if any of the thirteen original states ever possessed the full powers of sovereign states. They did not declare their independence as individual states, nor were they recognized as such. These external powers, such as they were, resulted from their combination. Conceding, however, that each of the states was a sovereign nation, it cannot be doubted that they intended to surrender all sovereign powers, so far as they relate to external affairs, to the general government. To deny that the United States has all the external powers inherent in a sovereign nation would be to deny the right of either the states or the general government to exercise such powers; and to hold that the general government has such powers is not in any way to set up a doctrine in conflict with the 10th Amendment to the Constitution.

### Powers of Internal Sovereignty

It is not, however, to the powers of external sovereignty that the advocates of the new school of constitutional construction refer, but to the powers of internal sovereignty which have been distributed between the general government and the individual states. It is at this point that the doctrine comes in conflict with the 10th Amendment. When the thirteen colonies became independent of the mother country, they possessed at least the full powers of internal sovereignty, and when the Constitution was adopted, these powers were distributed or partitioned between themselves and the United States. All the powers of internal sovereignty must reside either in the United States or in the several states, or else must be reserved to the people by being denied, either expressly or by implication, to both the United States and the states.

### Is there a Vacant Zone?

But we are told that in the distribution of these powers certain vacancies have been left between Federal and state control which ought to be filled up. Theoretically, at least, it would seem that this could not be true. The burden of proof to show that there is such a vacant zone must be on those who allege its existence. What do the advocates of the new constitutional doctrine mean by the so-called vacant or twilight zone? Mr. Roosevelt's idea of the neutral zone may be gathered from the decisions cited by him in his address before the Colorado legislature, namely, the decision in the Knight Sugar Trust Case [2] and the New York Bake Shop Case.[3] In the Sugar Case, the Supreme Court held in effect that the defendant company could not be dissolved as a monopoly in restraint of trade; that if the acts of the companies involved created a monopoly, it was a monopoly of manufacture, and not of commerce. "That which belongs to commerce," said the court, "is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state." This, then, is plainly a decision that the United States only had no power to control the monopoly if it existed. It is not a decision that neither the United States nor the state had such power. There could not be a zone in this case, theoretically, at least, in which neither the United States nor the state could act. The argument, how-

[1] Holland's Jurisprudence, p. 45.

[2] United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

[3] Lochner v. People, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133.

ever, is that it is easier for the nation to act effectively in such a case than for an individual state, and that, therefore, if the nation is denied the power a twilight zone is created.

In the Bake Shop Case the court decided simply that the attempt to limit the hours of employment in bakeries was an arbitrary interference with the freedom of contract guaranteed by the 14th Amendment to the Constitution, it not appearing that the work in a bakery was such as to justify the exercise of the police power of the state to protect the public health, safety, morals, or general welfare. Mr. Roosevelt says of this decision: "In effect it reduced to impotence the only body which did have power, so that in this case the decision, although nominally against state rights, was really against popular rights, against the democratic principle of government by the people under the forms of law." So it seems the twilight zone created by this decision is simply a zone of activity expressly denied by the Constitution to the states, and also, by another provision, to the United States itself. We must not be side tracked by the debatable question whether certain acts are in fact violations of constitutional provisions. This must be left to the courts. They may not always decide with the greatest wisdom; but, since men must differ in opinion on such questions, there must be an umpire. It is the only means we have for the solution of the problems presented. This is the best substitute possible for war or force. The decision in the Bake Shop Case, then, is that certain acts cannot be done by the state because they interfere with the freedom of contract. The people have seen fit to deny to both the nation and the individual states the right to interfere with freedom of contract. As to this right, therefore, the people have expressly created a twilight zone, in which neither nation nor state can act.

### Constitutionality of Extension of Federal Power

So it would appear that what is meant by Mr. Roosevelt by the twilight zone is: first, a zone in which it is easier for the general government to act effectively than for the government of any of the individual states, but in which the Constitution forbids action by the general government, but permits it by the state governments, and, second, a zone in which the Federal Constitution forbids both the nation and the state to act. Therefore the extension of the power of the Federal government by executive action, by legislation, and by judicial construction into such a zone would be to override the plain provisions of the Constitution. Senator Root has made the position of the new school of constitutional constructionists plain by saying that "it is useless for the advocates of state rights to inveigh against the supremacy of the Constitutional laws of the United States, or against the extension of national authority in the fields of necessary control, where the states themselves failed in the performance of their duty." The doctrine of the new school is nothing less than a plea for a disregard of the plain provisions of the Constitution, on the ground of expediency,—a plea for the full powers possessed by the British Parliament, in spite of the denial of such powers by the supreme law of the land. Without meaning to be in the least disrespectful to the distinguished advocates of this doctrine, one can hardly fail to recall the confidential remark: "What is the Constitution between friends" which once set the whole country in a roar, and which made its author, the Honorable Timothy J. Campbell, famous. It now seems that this was not so bad after all. If the New York legislator had applied his idea to the Federal Constitution, had clothed his thought in more elegant diction, had spoken more learnedly of "unwritten" Constitutions, and referred to the Supreme Court as a "continuous constitutional convention," who knows but that he might have been assigned a high place in the constitutional history as the founder of this new school of constitutional construction. But it seems that this was not to be. Besides, like many another great dreamer, the Honorable Timothy J. Campbell was in advance of his time.

# Shall the Republic Endure?

BY S. S. FIELD, Esq.,
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[Mr Field asserts the gradual loss of power by the States, and shows how they may recover some of their lost prestige.—Ed.]

THE framers of the Constitution were unanimously of the opinion that the preservation of the state governments in full vigor and influence was essential to the perpetuation of the Republic.

Jefferson and Hamilton, the founders of opposing political schools, agreed in this.

Jefferson advocated "the support of the state governments in all their rights as the most competent administration for our domestic concerns, and the surest bulwarks against anti-republican tendencies."

And Hamilton said: "The state governments are essentially necessary to the form and spirit of the general system."

Hence the decline of the state, in power and influence, is a matter of deepest concern to all who love liberty and breathe the patriot's prayer: *Esto perpetua.*

The state, as a constituent element of our Republic, has sadly lost power and prestige, both absolutely and relatively.

Various causes have contributed to produce this condition; the chief being the civil war and its result.

### Expansion of Federal Power and Jurisdiction.

Among the first fruits of the war-born theory of interpreting the Constitution was the establishment of the present national banking system. For, although Congress, under the influence of Hamilton, had before chartered banks, and the act had been sanctioned by the Supreme Court, the contention of Jefferson, that Congress had no such power, finally triumphed in Jackson's veto of the act to recharter the bank; and this view had been acquiesced in for more than a generation.

No attack is here intended upon the national banking system, which is too firmly established to be now questioned; my purpose being merely to point out that thereby the important power of creating banks of issue, theretofore exercised by the states, was taken from them and absorbed by the Federal government.

Recently there have been added Federal savings banks, and they are to be followed, many fear, by a gigantic central bank of issue.

Advancing, step by step, Congress has not only assumed the regulation of all interstate commerce, and also the regulation of all railroads and vessels carrying interstate commerce, but its power to incorporate companies to build bridges over navigable waters, and companies to build railroads for the transportation of interstate commerce, and the power to invade a state and occupy its territory for the purpose of building such bridges or railroads, has been upheld by the Supreme Court. And, lastly, so eminent a lawyer as our present President has given it as his official opinion that Congress has power to pass a law to provide for the incorporation of all kinds of private corporations engaging, or intending to engage, in interstate commerce, and has recommended the passage of such a law. Keeping in mind the growing tendency to carry on almost all business enterprises by means of corporations, and the fact that, with increased facilities for rapid transportation, nearly every kind of business may be said to be interstate commerce, the recommendation of the President is nothing less than a proposition for Congress to assume the regulation and control of practically all of the important business of the entire country.

We now have Federal inspectors to pass upon our food and medicines; there are advocates of a national bureau of health; others desire the Federal govern-

ment to build roads throughout the states; and still others propose that Congress should undertake, or assist in, the education of the people.

Thus step by step has the Federal government, through its legislative arm, advanced its power and jurisdiction. The Federal judiciary has kept step with the onward march.

When the Supreme Court, early in its history, held that a state might be sued by a citizen in a Federal court, the decision alarmed the states, and led to an amendment changing the meaning of the Constitution as thus interpreted, on that point.

For a long time the power of the Supreme Court to review the decision of a state court, in any case, was vigorously disputed.

Nearly thirty years after the adoption of the Constitution of the United States, the supreme court of appeals of Virginia, after great consideration, solemnly declared: "The court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this court; . . . and that obedience to its mandate is declined by this court." Hunter v. Martin, 4 Munf. 58.

Now, although the 11th Amendment still remains a part of the Constitution, a single, subordinate, Federal judge fulminates his injunction, like the thunders of Olympian Jove, against the attorney general, state's attorneys, sheriffs and clerks of courts of a state, forbidding them to execute a law of the state, duly passed in the exercise of its sovereignty. . . .

The exercise of jurisdiction by the Federal courts has been, and is, advancing by gigantic strides; due, in part, to the growth of the country; in part to new legislation; in part to the increasing number of foreign corporations doing business in a state, which, when sued, remove their cases into the Federal courts; in part to the fact that every corporation that wishes to set aside a law of a state goes into a Federal court for an injunction; and in part to the natural disposition of man to increase his authority and jurisdiction, when he has the power to do so. And the Federal judges are men,—wise men, no doubt, and honorable and learned in the law; yet men.

### The Federal Judiciary.

The Federal judiciary is the one illogical constituent in our system of government.

The fundamental theory of our Republic, that sovereignty resides in the people, and that public officers are but servants or agents of the sovereign people, vanishes when we stand in the presence of the Supreme Court of the United States, whose members hold office for life, and are answerable to no one save God and their consciences, and whose power extends to nullifying the highest acts of sovereignty of state and nation.

. . . . . .

Jefferson was very apprehensive in regard to the power of the Federal judiciary. In a letter written a few years before his death, he said: "It has long been my opinion, and I have never shrunk from its expression (although I do not choose to put it into newspaper, nor, like a Priam in armor, offer myself its champion), that the germ of dissolution of our Federal government is in the Constitution of the Federal judiciary, an irresponsible body (for impeachment is scarcely a scarecrow) working, like gravity, by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction until all shall be usurped from the state, and the government of all be consolidated into one. To this I am opposed; because when all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the center of all power, it will render powerless the checks provided by one government on another, and will become as venal and oppressive as the government from which we separated."

### Growth of Executive Power.

The legislative and judicial branches of the Federal government could not grow so great without a corresponding growth of the Executive. He appoints all the judges, marshals, and district at-

torneys, a small army of custom-house officers and internal revenue collectors, another army of secret service men, a large army of postmasters, a great retinue of ambassadors, and other foreign ministers, consuls, and agents, and all the officers of the Army and Navy, of both of which he is Commander-in-Chief.

If any President should see fit to use it, what a tremendous influence could he not exert, by means of executive patronage, over Congress and the courts!

Theoretically, the President is under the law, the Supreme Court has so declared,—by a majority of one; but is there no danger that, at some future time, some ambitious and popular man, returned from a foreign conquest, and elected President as the champion of the people, might feel that his powers were too great to be confined by a theory, and that, for the good of the people, he ought to be President for life?

The Supreme Court came within one vote of holding that the President of the United States was above the law; that the title to land taken possession of and held under his orders could not be inquired into or passed on by any court; a doctrine, said Mr. Justice Miller, speaking for the majority, that "sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." United States v. Lee, 106 U. S. 221, 27 L. ed. 182, 1 Sup. Ct. Rep. 240.

Yet, if one judge had changed his mind, as afterwards occurred in the Income Tax Case, the Supreme Court would have sanctioned that same tyranny.

The little war with Spain gave another occasion to expand the Constitution to meet the new situation, resulted in an increase in our standing Army, gave a new impetus to the sentiment for a great Navy, and crowned the Federal government with a halo of world-power fame.

The sentiment perhaps is growing for a Federal Navy big enough to whip any other on earth, and if it triumphs, the next step will be for a proportionately great Federal Army. And the next step will be to find something for the great Navy and great Army to do. . . .

### How States may Increase Their Influence.

If we see danger to liberty and to the perpetuation of free institutions in the overgrown and still growing power of the Federal government, and the dwindling power of the states, it beomes our duty, as lovers of liberty and country, to conceive and suggest measures to avoid the danger.

Some simple preventives will at once suggest themselves to your minds.

Let the states build good roads, as Maryland is now doing; improve their systems of education; protect the health of their people; pass reasonable measures to protect the workmen in mines and factories; study means to get rid of the pests that destroy the farmers' crops; open banks where the people can intrust their money to the states, or provide for the guaranty of bank deposits; let there be annual meetings of the governors and attorneys general of the states for conference and for securing uniformity of state legislation, where desirable; in short, let the states get busy. The world moves so fast now, that laggards and drones, whether men or states, are left behind and are forgotten.

The notion that a government exists only for the purpose of collecting taxes and preventing people from hurting one another is out of date. If the state government will not occupy proper fields of governmental action in response to popular demand, the people will turn to the Federal government for relief. It is safe to say that very much of the field of governmental activity which has in recent years been occupied by the Federal government would have been left to the states, if they had been prior occupants.

By pursuing such measures, the states will increase in influence among the people, but it is believed that some direct safeguards are necessary to curtail the growing powers of the Federal government, and prevent it from becoming the vortex into which absolute power shall be absorbed.—From paper read before the Virginia and Maryland Bar Associations, July, 1910.

# Republic or Democracy--Which?

BY LYNN HELM,

President of the California Bar Association.

[Mr. Helm protests against innovations that would change our republican form of government to a democracy, and urges that any alterations made in the fundamental law be brought about by an amendment of the Constitution, rather than by its strained and forced construction.—Ed.]

We should guard against revolutionary changes in the form of our government, and it is the duty of the Federal government to protect in each state of the Union a republian form of government. I cannot believe that the initiative, referendum, and recall are republican forms of government that should be protected under the guaranty of the Federal Constitution. While one republican form of government may be substituted for another, it seems to me that these innovations are so necessarily a democracy that they are easily distinguished from a republican form of government; they are anti-republican institutions, and are modifications of the fundamental structure of our government; they are nullifying and destroying of a representative government.

## The Recall.

Of the recall, as much may be said; if it had been inserted in our fundamental law, even the great Washington, in the time of the French Revolution, would have been removed from office under the stress of public clamor, and the immortal Lincoln would have been swept from office upon the prayer of twenty millions of people as represented by Horace Greeley. It is now proposed to extend the recall even to the judges upon the bench,—then in whom will vest the judgment of the courts? Who will be the final arbiter of the affairs of men?

We might as well think of changing the complexion of the Supreme Court, to make their decisions conform to public clamor. Why not at once abolish all distinction between the executive, legislative, and judicial departments of the government, and do away forever with that greatest bulwark of a free people,—an independent judiciary?

So early a writer as Montesquieu declared: "There is no liberty if the power of judging be not separated from the legislative and executive powers. If it were joined to the legislative power, authority over the life and liberty of citizens would be arbitrary; for the judge would be the legislator. If it were joined to the executive authority, the judge would have the power of a tyrant."

An independent judiciary has been granted by the will of the sovereign people as expressed in their several Constitutions. If this guaranty should not be kept effective, I cannot conceive of any other result than anarchy.

## Sufficiency of Republican Government.

But I do not look for any revolution from this source. It has been caused by the idea that there has been corruption among the representatives of the people, and their too great subserviency to corporations and the great moneyed interests, which have opposed any attempt to place them under effective government control; that the tendency of American legislation has been to consider the prosperity of certain classes as an end in itself, and to ignore equal and concurrent branches of industry. But the people have awakened to their rights in the premises; they have come into their own, and have again elected representatives of their own choosing, are enjoying a free suffrage; and corporate power has been checked; and, treating with the large moneyed class and corporations as individuals, as proposed by the learned Woodrow Wilson, we shall soon accomplish much in doing away with class distinctions.

The people, recognizing that the government is popular because it truly reflects the will of the people, will no longer clamor for a democray, but will dwell contented under a republican govern-

ment, which has not alone weathered the storm of civil conflict, but has justly commanded the admiration of the world. The pendulum will swing back. A republican form of government serves our purposes, and gives us a commanding position among the nations of the world.

### Reform Under Constitution.

As lawyers we are not advocates of disintegration. We may be conservative and at the same time progressive. It may be that the Federal Constitution has great powers of resistance to all reforms; it has been able to stand the strain even against violent agitation. Of all the features of the American Union, that which moves our admiration most is that we have had a Constitution which has been sufficient for our purpose and which has withstood the fiercest trials; under it the American people have had the wisdom to plan and the courage to succeed in establishing and preserving order and freedom. The Constitution is a written charter filled with the spirit of life.

The people of the United States, free and independent, have an original right to establish for their future government such principles as in their opinion shall most conduce to their own security and happiness. This is the basis of the whole American Union, and, while it cannot be frequently repeated, if changes are to be made in the fundamental law they must be done by an amendment of the Constitution, and not by a strained and forced construction thereof. For the purpose of limiting different departments of the government, limitations were committed to writing, and the Constitution thus adopted is the superior paramount law, unchangeable by ordinary means, and not alterable at the will of any of the departments of the government. Certain limits are not to be transcended by the departments of the government.

We are not jealous of the desire of the people to take part in the enactment of laws. In making any objection to the exercise by the people of the initiative, referendum, or recall, we are not trying to stand off a revolution. A revolution will not come from this agitation and clamor of the people for a more popular government, but the effect will be to make the people of this Union have a greater realization of their right in a free suffrage. In a free government it is of essential importance that the right of suffrage should be free. When the people have recognized their rights in this respect they will have greater opportunity in the selection of their representatives. To vote for their representatives freely is to perform the highest act of original sovereignty. Upon this foundation will rest the prolongation of the spirit of this republican form of government.

### Constitutional Government.

That the people of this Union may continue to be governed by the forms prescribed by the Constitution, and that the fundamental law shall not be violated, is the desire which animates the hearts of all American lawyers. Their first wish, however, is that the people may be free. The American citizen lives in a land "with a government of laws, and not of men; conformable to nature, conceived in wisdom, administered with justice, and clothed with power."—From address entitled "Nationalism: A Study of the American Union," delivered before the Nebraska Bar Association, December 28th, 1910.

# Insanity as a Defense in Homicide Cases

BY FRANK H. BOWLBY

Editor of Wharton on Homicide, and Legal Editor of Clevenger on Insanity and Wharton & Stille's Medical Jurisprudence.

[The preceding portion of Mr. Bowlby's valuable article appeared in the March number of Case and Comment.—Ed.]

## Insane delusions.

An insane delusion, within the meaning of the criminal law, is an unreasonable and incorrigible belief in the existence of facts which are either impossible absolutely, or impossible under the circumstances of the case;[64] a fixed belief which is contrary to universal experience and known natural laws;[65] a belief in the existence of facts in which no rational person would believe.[66] But a belief founded upon reason and reflection is not an insane delusion, however absurd it may be,[67] though a belief upon the part of a person accused of crime, that he had not slept for eight years, is an insane delusion on that subject.[68]

One who is led to the commission of a criminal act by an insane delusion controlling the will and judgment is not criminally responsible therefor;[69] but a delusion is no excuse for a criminal act when the act is in no way connected with the delusion, and not produced by it.[70] And the fact that a person has an insane delusion upon one subject does not affect his responsibility for a crime with reference to other matters, not connected with the particular delusion, where he is capable of distinguishing between right and wrong as to the particular act.[71] The test of criminal responsibility in case of delusion, conforming most closely both to reason and authority, is the capacity to distinguish between right and wrong at the time of the commission of the criminal act in question, with respect to such act, and the absence of insane delusion with reference to that subject.[72] The question is, Did he do the act under a delusion, believing it to be other than it was;[73] and the delusion, to be a defense, must have been total, not merely partial.[74] The existence of an insane delusion is no defense unless it rendered the person incapable of knowing what he was doing, or forming a criminal intent;[75] and the existence of an insane delusion is important in a criminal prosecution only as it throws light upon the question of knowledge or capacity of the party to know right from wrong.[76] So, to be a defense to a charge of homicide or other criminal act, an insane delusion must be objective, as distinguished from subjective; the objective delusion being a delusion of the senses, or such as relate to facts or objects, being visual or other sensual mistakes, as distinguished from subjective delusions, which are mere delusions as to matters of personal duty; and the delusion, to be a defense, must involve an honest mistake as to the object at which the crime is directed.[77] Delusions of danger are objective delusions; and one is not criminally responsible for a homicide, where it was committed under the delusion that the person killed was about to do him a serious personal injury, and that he was acting in self-defense.[78] And a delusion upon the part of one person that another was a robber who had entered his house, under which delusion he killed the supposed robber, is objective and a good defense.[79] But a belief upon the part of a person as to the right and wrong and as to the justifiableness of his acts, though mistaken and sincere, does not constitute a delusion which will excuse a criminal act.[80] With reference to subjective delusions, another test must be taken; such delusions are no defense unless they are insane. And if there is reason enough to dispel the delusion, and the party refuses to listen to arguments by which the delusion could be dispelled, and cherishes such delusion, and

64 State v. Lewis, 20 Nev. 333, 22 Pac. 241, 8 Am. Crim. Rep. 574; Guiteau's Case, supra.
65 Com. v. Meredith, 14 W. N. C. 188.
66 Ibid.
67 Guiteau's Case, supra; Cannon v. State, 41 Tex. Crim. Rep. 467, 56 S. W. 351.
68 United States v. King, 34 Fed. 302.
69 Stevens v. State, 31 Ind. 486, 99 Am. Dec. 634; State v. Miller, supra.
70 State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; State v. Lawrence and Bovard v. State, supra; State v. Simms, 71 Mo. 538; Hawe v. State, 11 Neb. 537, 38 Am. Rep. 375, 10 N. W. 452.
71 State v. Windsor, 5 Harr. (Del.) 512; State v. Lawrence, supra; People v. Ferraro, 161 N. Y. 365, 55 N. E. 931; Com. v. Mosler, 4 Pa. 264; Wilcox v. State, 94 Tenn. 106, 28 S. W. 312; Merritt v. State, 39 Tex. Crim. Rep. 70, 45 S. W. 21, 11 Am. Crim. Rep. 518; United States v. Ridgeway, 31 Fed. 144.
72 Casey v. People, 31 Hun, 158; Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854, 7 Am. Crim. Rep. 266; State v. Mewherter, 46 Iowa, 88; State v. Murray, 11 Or. 413, 5 Pac. 55; Wilcox v. State and Bellingham's Case, supra.
73 R. v. Townley, 3 Fost. & F. 839.
74 Humphreys v. State, 45 Ga. 190.
75 Hall v. Com. 9 Sadler (Pa.) 279, 22 W. N. C. 25, 12 Atl. 163.
76 Guiteau's Case, 10 Fed. 161.
77 R. v. Burton, 3 Fost. & F. 772; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; Willis v. People, 5 Park. Crim. Rep. 622.
78 People v. Taylor, 138 N. Y. 398, 34 N. E. 275; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; Merritt v. State, 39 Tex. Crim. Rep. 70, 45 S. W. 21, 11 Am. Crim. Rep. 518.
79 Levett's Case, Cro. Car. 538.
80 Com. v. Wireback, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542.

makes it a pretext of wrongs to others, he is responsible for such wrongs, and it is allowable, in a prosecution in which an insane delusion is set up for a defense, to give evidence that the delusion was sane, or, in other words, was an opinion which ordinary processes of reasoning might have produced.[81] A common illustration of a subjective delusion is the claim of the Mormon prophets of a direct revelation permitting them to practise polygamy. They would not be permitted to plead their delusion, since they are sane, shrewd men, and must be held responsible for their delusions. Likewise, a delusion, to be a defense against a charge of homicide, or other criminal act, must be such that, if the thing believed in by the deluded person were true, it would be an excuse; if it were true, and would be no excuse to a sane man, the perpetrator is criminally responsible.[82] And criminal responsibility is relieved only when the facts or state of facts believed in under the influence of the delusion would, if actually existing, have justified the act and rendered it excusable.[83] One is criminally responsible for an act committed while laboring under the delusion that he was redressing or avenging some injury or grievance, or producing or obtaining some profit or public benefit, or that another was exercising a malign influence over him.[84] And a person who kills another is not relieved from responsibility by a delusion that the latter was trying to marry his mother, against her will, since that, if true, would not warrant the killing.[85] And an insane delusion entertained by a convict, that another convict was spying upon him with intent to betray his plans of escape from the prison, does not affect the consequences of his act in killing him.[86] But one who commits a crime under the delusion that God has commanded him to do it is not criminally responsible therefor;[87] though a belief in spirits upon the part of the accused, and that spirits whispered to him and bade him do the criminal act in question, furnishes no defense, though it may be evidence for the jury upon which to base its judgment with regard to his understanding and comprehension.[88]

## Irresistible impulse.

An irresistible impulse, in the law of insanity, is an irresistible inclination to kill, or commit some other offense, consisting of some unseen pressure on the mind, drawing it to consequences which it sees, but cannot avoid; holding it under coercion, so that, while it clearly perceives the results, it is incapable of resisting.[89] The impulse, to operate as a defense, must be an insane one, as distinguished from passion.[90] Some jurisdictions have repudiated the doctrine of irresistible impulse as a defense for homicide, either partially or entirely. In Illinois, however, it is held to be the rule that where the insanity was the efficient cause of the act, and the act would not have been done but for the affection, the accused should be acquitted; but the unsoundness of mind must be of such a degree as to create an uncontrollable impulse to do the act charged by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them.[91] And in a number of states the true test has been said to lie in the word "power;" has the accused power to distinguish right and wrong, and the power to adhere to the right and avoid the wrong?[92] So, insane irresistible impulse is regarded as a defense in Ohio, Minnesota, Kentucky, and Iowa.[93] And the Supreme Court of the United States has made decisions to the same effect.[94] And New Hampshire, Delaware, Connecticut, Texas, and Alabama, and other states, have adopted the same rule.[95] There are two constituent elements of legal responsibility for crime: first, capacity of intellectual discrimination; and second, freedom of will.[96] And an exception to the general rule of criminal responsibility exists under that doctrine where one has sufficient reason to distinguish between right and wrong as to the particular act to be committed, but, in consequence of some delusion, the will is overmastered, and there is no criminal intent.[97] Even under this rule, however, irresistible impulse is not a defense in a criminal prosecution unless it subjugates the intellect, controls the will, and renders it impossible for the person to do otherwise

81 Com. ex rel. Haskell v. Haskell, 2 Brewst. (Pa.) 491.
82 State v. Mewherter, 46 Iowa, 88; M'naghten's Case, 10 Clark & F. 200.
83 Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; Smith v. State, 55 Ark. 259, 18 S. W. 237; People v. Hubert, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329; Com. v. Rogers, supra; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360; Thurman v. State, 32 Neb. 224, 49 N. W. 338; People v. Taylor, 138 N. Y. 398, 34 N. E. 275; Com. v. Freeth, 5 Clark (Pa.) 455; Merritt v. State, supra.
84 Humphreys v. State, 45 Ga. 190; M'Naughten's Case, supra.
85 Bolling v. State, 54 Ark. 588, 16 S. W. 658.
86 People v. Taylor, 138 N. Y. 398, 34 N. E. 275.
87 Guiteau's Case and Com. v. Rogers, supra.
88 People v. Waltz, 50 How. Pr. 204.
89 Dejarnette v. Com. 75 Va. 867; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731.
90 McCarty v. Com. 114 Ky. 620, 71 S. W. 656.
91 Dunn v. People, 109 Ill. 635, 4 Am. Crim. Rep. 52; Dacey v. People, 116 Ill. 555, 6 N. E. 165, 6 Am. Crim. Rep. 461.
92 Com. ex rel. Haskell v. Haskell, 2 Brewst. (Pa.) 491; Grubb v. State, 117 Ind. 277, 20 N. E. 257, 725.
93 Blackburn v. State, 23 Ohio St. 146; State v. Gut, 13 Minn. 341, Gil. 315; Abbott v. Com. 107 Ky. 624, 55 S. W. 196; State v. Felter, 25 Iowa, 67.
94 Mutual L. Ins. Co. v. Terry, 15 Wall. 580, 21 L. ed. 236; Davis v. United States, 165 U. S. 373, 41 L. ed. 750, 17 Sup. Ct. Rep. 360; United States v. Hewson, Brunner, Col. Cas. 532, Fed. Cas. No. 15,360; Guiteau's Case, 10 Fed. 161.
95 State v. Jones, 50 N. H. 369, 9 Am. Rep. 252; State v. Cole, 2 Penn. (Del.) 344, 45 Atl. 391; State v. Johnson, 40 Conn. 136; King v. State, 9 Tex. App. 515; Lide v. State, 133 Ala. 43, 31 So. 953; and see People v. Finley, 38 Mich. 482; State v. Peel, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; Lowe v. State, 118 Wis. 641, 96 N. W. 417.
96 Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854, 7 Am. Crim. Rep. 266; Farrer v. State, 2 Ohio St. 54.
97 Taylor v. State, 105 Ga. 746, 31 S. E. 764; Lide v. State, 133 Ala. 43, 31 So. 953; State v. Cole, 2 Penn. (Del.) 344, 45 Atl. 391.

than to yield.[98] The test in such case is whether the accused had sufficient reason to know right from wrong, and whether or not he had sufficient power to control and govern his actions and resist his morbid inclination to perpetrate the offense.[99] An act is punishable though committed by one under an irresistible impulse, where his mental faculties were in a sound normal condition;[100] and a person with no mental disorder, who commits a criminal act from overmastering anger, jealousy, or revenge, is responsible therefor.[101] The question whether the insane impulse was irresistible is one of fact for the jury.[102]

There seems to be no question, however, that the position that an irresistible impulse can be a defense is inconsistent with the rule laid down in the great body of cases which sustain the right-and-wrong test as an exclusive standard of criminal responsibility of persons claimed to be insane, and the courts of a number of the states have adopted the rule that irresistible impulse alone is no excuse for crime when the person is able to distinguish between right and wrong.[103] The test of responsibility in jurisdictions not recognizing irresistible impulse as a defense is the usual one,—whether the accused could distinguish between right and wrong, and knew what he was doing, and that it was wrong.[104] But even under this rule, where there is an uncontrollable impulse to do a criminal act, so great as to deprive the person of the ability to distinguish right from wrong in regard to that particular act, the person is irresponsible.[105]

## Moral insanity.

Moral insanity is defined to be a morbid state of the affections and passions, or unsettling of the moral system, the mental faculties remaining normal and sound,—[106] an irresistible impulse to commit a criminal act, co-extensive with mental sanity.[107] In England the doctrine of moral insanity, so far as it involves the idea of irresponsibility based exclusively on moral, as distinguished from mental, derangement, is rejected by the courts.[108] And in the United States there is almost a unanimous refusal of judicial recognition of this theory, and the almost universal tendency is to hold that no amount of derangement of morals is a defense unless accompanied by mental insanity. This has been held in effect in Massachusetts, Maine, Connecticut, New York, New Jersey, Delaware, Virginia, North Carolina, Georgia, Ohio, and California.[109] And decisions have been rendered to the same effect in other jurisdictions where the question has been mooted.[110] Mere moral obliquity of the propensities will not protect a person from punishment for a criminal act;[111] nor will a mere perversion of the affections.[112] And if, from evil association and indulgence in vice, a person's conscience ceases to control or influence his actions, but he is otherwise capable of committing crime, he is criminally responsible,—[113] criminal responsibility depending, not upon the power to refrain from doing what is known to be wrong, but whether the accused, at the time of committing the act, knew its character and nature,

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**98** State v. Windsor, 5 Harr. (Del.) 512; Meyer v. People, 156 Ill. 126, 40 N. E. 490; Grubb v. State, 117 Ind. 277, 20 N. E. 257, 725; State v. Mewherter, 46 Iowa, 88; Scott v. Com. 4 Met. (Ky.) 227, 83 Am. Dec. 461; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; Taylor v. Com. 109 Pa. 262; Wilcox v. State, 94 Tenn. 106, 28 S. W. 312; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; Com. v. Jones, 1 Leigh, 612.

**99** Parsons v. State, 81 Ala. 577, 60 Am. Rep. 195, 2 So. 854, 7 Am. Crim. Rep. 266; Williams v. State, 50 Ark. 517, 9 S. W. 5; State v. Reidell, 9 Houst. (Del.) 470, 14 Atl. 550; Hornish v. People, 142 Ill. 620, 32 N. E. 677, 18 L.R.A. 237; Plake v. State, 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; Montgomery v. Com. 88 Ky. 509, 11 S. W. 475; State v. Hundley, 46 Mo. 414; Burgo v. State, 26 Neb. 639, 42 N. W. 701; State v. Hansen, 25 Or. 391, 35 Pac. 976, 36 Pac. 296; Blackburn v. State, 23 Ohio St. 146; Com. ex rel. Haskell v. Haskell, 2 Brewst. (Pa.) 491.

**100** Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; State v. Mewherter, 46 Iowa, 88; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539.

**101** Bolling v. State, 54 Ark. 588, 16 S. W. 658; Plake v. State, 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; State v. Felter, 25 Iowa, 67; Fitzpatrick v. Com. 81 Ky. 357; People v. Durfee, 62 Mich. 487, 29 N. W. 109; Sayres v. Com. 88 Pa. 291.

**102** State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; Grubb v. State, 117 Ind. 277, 20 N. E. 257, 725; People v. Egnor, 175 N. Y. 419, 67 N. E. 906.

**103** State v. Brandon, 53 N. C. (8 Jones, L.) 463; Green v. State, 64 Ark. 523, 43 S. W. 973; People v. Hubert, 119 Cal. 216, 63 Am. St. Rep. 72, 52 Pac. 329; State v. Yarborough, 39 Kan. 581, 18 Pac. 474; State v. Knight, 95 Me. 467, 50 Atl. 276, 55 L.R.A. 373; Spencer v. State, 69 Md. 28, 13 Atl. 809; State v. Dunn, 179 Mo. 95, 77 S. W. 848; Mackin v. State, 59 N. J. L. 495, 36 Atl. 1040; People v. Carpenter, 102 N. Y. 238, 6 N. E. 584; State v. Alexander, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440; Cannon v. State, 41 Tex. Crim. Rep. 467, 56 S. W. 352; United States v. Faulkner, 35 Fed. 730; R. v. Haynes, 1 Fost. & F. 666.

**104** State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; Green v. State, supra; State v. O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L.R.A. 555; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; State v. Scott, 41 Minn. 365, 43 N. W. 62; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; Wilcox v. State, 94 Tenn. 106, 28 S. W. 312; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 9 Am. Crim. Rep. 626, 18 L.R.A. 224.

**105** Wright v. People, 4 Neb. 407; Com. v. Rogers and Cunningham v. State, supra; People v. Kleim, 1 Edm. Sel. Cas. 13.

**106** Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292.

**107** Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; State v. Potts, 100 N. C. 457, 6 S. E. 657.

**108** R. v. Oxford, 9 Car. & P. 525; R. v. Barton, 3 Cox, C. C. 275.

**109** Com. v. Rogers, supra; State v. Lawrence, 57 Me. 574; State v. Richards, 39 Conn. 591; Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216; State v. Spencer, 21 N. J. L. 196; State v. Windsor, 5 Harr. (Del.) 512; Vance v. Com. 2 Va. Cas. 132; State v. Potts, supra; Fogarty v. State, 80 Ga. 450, 5 S. E. 782; State v. Gardiner, Wright (Ohio) 392; People v. Methever, 132 Cal. 326, 64 Pac. 481.

**110** See Cawley v. State, 133 Ala. 128, 32 So. 227; Green v. State, 64 Ark. 523, 43 S. W. 973; Davis v. State, 44 Fla. 32, 32 So. 822; State v. Yarborough, 39 Kan. 581, 18 Pac. 474; State v. Coleman, 27 La. Ann. 691; Spencer v. State, 69 Md. 28, 13 Atl. 809; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360; State v. Miller, 111 Mo. 542, 20 S. W. 243; Schwartz v. State, 65 Neb. 196, 91 N. W. 190; Harrison v. State, 44 Tex. Crim. Rep. 164, 69 S. W. 500.

**111** Taylor v. Com. 109 Pa. 262.

**112** Goodwin v. State, 96 Ind. 550.

**113** Green v. State, supra.

and that it was a wrongful one.[114] In a few states, however, the courts have recognized a mental dualism in man, consisting of an intellectual and a moral nature, and recognized that the existence of a type of moral, as distinguished from intellectual, insanity, such as homicidal mania, or an uncontrollable appetite for mankilling, or pyromania or kleptomania, may operate as an excuse for a criminal act.[115] And a Connecticut case, though denying the purpose of recognizing this form of insanity as an excuse for crime, did recognize it to the extent of holding that, when satisfied of its existence, a court should consider it in determining the degree of the crime, and give it such weight as it is fairly entitled to under the circumstances;[116] and though apparently confounded with irresistible impulse, the existence of moral insanity, and the fact that it might operate as an excuse for a criminal act, in a proper case, have also been recognized in Pennsylvania.[117] But even the courts admitting that moral insanity may be a defense to crime hold that evidence of its existence is to be received with great caution.[118] And the utmost care should be taken by the court in presenting to the jury the legal principles relating to it.[119] The doctrine of moral insanity as a ground for immunity from criminal responsibility is regarded as dangerous, and can be recognized only in the clearest cases, and the disturbance ought to be shown to have been habitual to be effectual.[120] And moral insanity ought never to be admitted as a defense in a criminal prosecution unless it appears that the propensity existed with such violence as to subject the intellect, control the will, and render it impossible for the party to do otherwise than yield.[121]

### Degree of crime as affected by insanity.

Under the modern rule on the subject of insanity as a defense to homicide or other crime, there is not deemed to be any condition intermediate between sanity and insanity which will mitigate crime without excusing it.[122] And where a person committing a homicide was conscious of what he was doing, and capable of distinguishing between right and wrong, and premeditated the commission of the act, he is guilty of murder in the first degree, though he was deranged.[123] Nor can a conviction of a lower degree of crime be had on the theory that the defendant's mind was unsound to a degree rendering him incapable of deliberation, where he knew the nature of the act.[124] And insanity cannot reduce homicide from murder to manslaughter unless the provocation was such at least as would stir the resentment of a reasonable man.[125] Evidence of insanity is admissible in such cases, however, to show the absence of any deliberate or premediated design.[126] And an instruction in a prosecution for homicide, that, if the accused was insane at the time of the act, the jury must declare him not guilty, without reference to the degree of insanity, is too broad, and cannot be sustained.[127] One who killed another when his mind was so far impaired as to render him incapable of deliberate, premeditated murder, but who was not totally irresponsible by reason of his insanity, should be convicted of murder in the second degree only.[128] And evidence of excitement and abnormal sensitiveness resulting from sunstroke and a fall, and other accidents, though not sufficient to establish irresponsibility, is sufficient to reduce the homicide from murder in the first, to murder in the second, degree.[129]

"In jurisdictions in which irresistible impulse, the mind being sane, is regarded as no defense to a homicide or other crime, violent passion is still to be taken into account as a mitigating element, and the peculiar temperament of the offender is to be gauged for the purpose of estimating whether the provocation was such as would create hot blood, and whether there was adequate cooling time. A sane person may, from epilepsy, or from prior insanity, or from nervous or physical derangement, or from hereditary taint, be peculiarly susceptible to excitement. And as the law treats assaults committed in hot blood as of a lower grade than those committed deliberately, this excitability may properly be considered in determining whether the blood at the time was hot. Hence, epileptic, nervous, and cerebral diseases, and hereditary tendencies may be put in evidence to lower the grade of the offense, though they do not amount to insanity. This is but following the authorities which declare that drunkenness, though no defense to crime, may be used to show that an assault was not deliberate." [130]

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114 State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; Green v. State and Schwartz v. State, supra; Cole's Trial, 7 Abb. Pr. N. S. 321; United States v. Faulkner, 35 Fed. 730; R. v. Barton, 3 Cox, C. C. 275.

115 Smith v. Com. 1 Duv. 224; Scott v. Com. 4 Met. (Ky.) 227, 83 Am. Dec. 461; St. Louis Mut. L. Ins. Co. v. Graves, 6 Bush, 268.

116 Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669.

117 Com. v. Mosler, 4 Pa. 264; Coyle v. Com. 100 Pa. 573, 45 Am. Rep. 397.

118 Com. v. Mosler, supra.

119 Scott v. Com. supra.

120 Coyle v. Com. and Com. v. Mosler, supra.

121 Scott v. Com. supra; Com. v. Werling, 164 Pa. 559, 30 Atl. 406; Ortwein v. Com. 76 Pa. 418, 18 Am. Rep. 420, 1 Am. Crim. Rep. 297.

122 Sage v. State, 91 Ind. 141; United States v. Lee, 4 Mackey, 489, 54 Am. Rep. 293; State v. Kotovsky, 11 Mo. App. 584; Sindram v. People, 1 N. Y. Crim. Rep. 448.

123 Nevling v. Com. 98 Pa. 323.

124 State v. Kotovsky, supra; Jarvis v. State, 70 Ark. 613, 67 S. W. 76; Osburn v. State, 164 Ind. 262, 73 N. E. 601; Com. v. Barner, 199 Pa. 335, 49 Atl. 60; Cornell v. State, 104 Wis. 527, 80 N. W. 745.

125 Horton v. United States, 15 App. D. C. 310; People v. Hurtado, 63 Cal. 288.

126 Sindram v. People and Sage v. State, supra; Hempton v. State, 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657; Youtsey v. United States, 38 C. C. A. 562, 97 Fed. 937.

127 People v. Best, 39 Cal. 690.

128 Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669; Cottell v. State, 12 Ohio C. C. 467; Pistorius v. Com. 84 Pa. 158, 2 Am. Crim. Rep. 284; Boren v. State, 32 Tex. Crim. Rep. 637, 25 S. W. 775; *Contra*, Jarvis v. State, supra; Com. v. Hollinger, 190 Pa. 155, 42 Atl. 548; Com. v. Barner, Supra.

129 People v. Conroy, 33 Hun, 119.

130 Wharton, Homicide, 3d ed. § 540; Wharton & S. Med. Jur. 5th ed. § 194.

## Relative functions of court and jury as to defense of insanity.

There has been a variety of theories on the question whether the definition and existence of insanity which will excuse crime is a question of law for the court, or of fact for the jury, and there are cases which seem to hold that all the questions connected with the question of insanity as a defense for crime are questions of fact.[131] And it has been claimed that the opinion of experts in the matter of insanity is the only reliable test of the existence of insanity. It is to be observed, however, that the question of guilt or innocence does not depend upon the question of sanity or insanity, but upon that of responsibility or irresponsibility; and one may be innocent to some degree, and yet not irresponsible to the law for his acts.[132] Criminal responsibility is necessarily, therefore, a question of law, though complicated probably in all cases more or less by questions of fact; and the practice of dividing the functions between the court and jury in each particular case, according to its own facts, is gaining strength; and the rule seemingly supported by the preponderance of modern authority is that the question as to how much intellect, understanding, judgment, and comprehension a man must have to make him amenable to the law with respect to a criminal act is one of law for the court.[133] And the sanity of a person who pleads guilty is an issue for the court, and is required to be shown before he can be convicted, and evidence of such sanity should be introduced at the time of the plea.[134] But the question of the existence of such insanity as will excuse the crime in question, where the commission of the criminal act is established, is one of fact for the jury,[135] under proper instructions,[136] to be submitted to and determined by it like any other fact in the case.[137] And it is a question for the jury to determine whether the mental condition of the accused was such that he was incapable of a specific intent to take life;[138] and the weight and sufficiency of evidence to establish the defense of insanity are questions exclusively for the jury,[139] and the verdict or finding will not be disturbed where the evidence as to insanity was conflicting.[140] It is not improper for the court to tell the jury that the defense of insanity should be examined with caution.[141]

Likewise, the rule that the question as to how much intellect one must have to make him amenable to the criminal law is one for the court, and that the existence of insanity which will excuse crime is a question of fact for the jury, applies to temporary or periodical insanity.[142] But it is a question for the jury whether the accused in a criminal prosecution labored under the influence of a delusion which rendered his mind insensible to the nature of his act;[143] and whether or not a criminal act was done by a person subject to temporary or recurrent insanity, during a fit of madness, is a question for the jury.[144] So, all symptoms of delusion or mental disease are matters of fact for the jury,[145] and so are questions as to the existence and effect on the mind of insanity which subverts the freedom of the will, and destroys the power of the victim to choose between right and wrong, though he may be able to perceive the difference between them.[146] And where insanity is alleged as a defense in a homicide case, the question as to whether the accused was guilty of murder in the first or second degree should be submitted to the jury, as well as the question whether or not he was innocent.[147]

## Proof to establish insanity conclusive.

Positive and direct testimony is not required to establish insanity as a defense;[148] nor is proof of specific acts of derangement.[149] And one may be acquitted on the ground of insanity though he objected to that defense, and asserted that he was not insane, and called witnesses to establish his sanity, where the whole evidence justifies a finding of insanity.[150] And a conviction will not be set aside on appeal because the evidence of insanity was affirmative, while that of sanity was negative.[151] The defendant's own testimony, however, that he did not know his act was wrong

131 See State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634.

132 People v. Webster, 59 Hun, 398, 13 N. Y. Supp. 414; State v. Jones, supra.

133 People v. Waltz, 50 How. Pr. 204; People v. Holmes, 111 Mich. 364, 69 N. W. 501.

134 Burton v. State, 33 Tex. Crim. Rep. 138, 25 S. W. 782.

135 Jamison v. People, 145 Ill. 357, 34 N. E. 486; Plake v. State, 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; State v. Geier, 111 Iowa, 706, 83 N. W. 718; State v. Holme, 54 Mo. 153; State v. Pike, supra; People v. Pine, 2 Barb. 566; State v. Stark, 1 Strobh. L. 479; Clark v. State, 8 Tex. App. 350.

136 People v. Pine, supra; Aszman v. State, 123 Ind. 347, 24 N. E. 123, 8 L.R.A. 33; State v. Geier and People v. Holmes, supra.

137 State v. Holme, supra.

138 United States v. King, 34 Fed. 302; Dejarnette v. Com. 75 Va. 867.

139 Brown v. Com. 14 Bush, 398; Sharp v. State, 161 Ind. 288, 68 N. E. 286; State v. Scott, 49 La. Ann. 253, 21 So. 271, 10 Am. Crim. Rep. 585, 36 L.R.A. 721.

140 Williams v. State, 50 Ark. 511, 9 S. W. 5; Jamison v. People, supra; State v. Dreher, 137 Mo. 11, 38 S. W. 567; Boren v. State, 32 Tex. Crim. Rep. 637, 25 S. W. 775.

141 People v. Kloss, 115 Cal. 567, 47 Pac. 459; Sanders v. State, 94 Ind. 147; People v. De Graff, 1 Wheeler, C. C. 203; State v. Barry, 11 N. D. 428, 92 N. W. 809.

142 Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360; R. v. Richards, 1 Fost. & F. 87.

143 Bowler's Case, 1 Collinson, Lunacy, 673; Grubb v. State, 117 Ind. 277, 20 N. E. 257, 725.

144 R. v. Richards, supra.

145 State v. Hundley, 46 Mo. 414.

146 Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854, 7 Am. Crim. Rep. 266; State v. Jones, supra.

147 People v. Walter, 1 Idaho, 386; People v. Webster, supra.

148 State v. Wright, 134 Mo. 404, 35 S. W. 1145.

149 People v. Tripler, 1 Wheeler, C. C. 48.

150 R. v. Pearce, 9 Car. & P. 667; State v. Reidell, 9 Houst. (Del.) 470, 14 Atl. 550.

151 Rinkard v. State, 157 Ind. 534, 62 N. E. 14.

or criminal, is not sufficient to establish idiocy or lunacy,[152] especially where he testifies to a state of facts inconsistent with such conclusion.[153] It is the province of the jury to weigh and consider the evidence of insanity in all its bearings.[154]

Evidence tending to prove that the accused in a criminal prosecution was insane at some period, either before or after the commission of the criminal act, is to be considered and weighed in connection with the acts of the party tending to establish the fact of insanity;[155] but proof of independent acts or circumstances subsequent to the commission of the crime is not alone sufficient to establish insanity at the time of its commission.[156] And a reversal on the ground of the exclusion of evidence of subsequent acts is not warranted unless it appears that they had some special significance, indicating mental disease.[157] And a new trial will not be ordered on the ground that the verdict was against the evidence where there was little, if any, testimony tending to show insanity up to the time of the offense, upon evidence as to the conduct of the accused after confinement, it appearing by the testimony of intimate acquaintances that he was a person of ordinary intelligence.[158] And the court cannot act upon evidence furnished by the present condition of the defendant on an appeal from a judgment of conviction, and upon that ground reverse a judgment otherwise legal, where his insanity has increased and developed since the trial.[159] Likewise, sanity shortly before and shortly after the act in question is strong evidence of sanity at the time it was committed, which can only be rebutted by showing frenzy or madness at the very time of the act, with reference to it.[160] And a minute recollection on the part of the accused of all the circumstances and details of the act a long time afterwards is strong evidence of his sanity at the time.[161]

So, the atrocious or terrible nature of the crime, or its enormity, is not evidence of the insanity of the perpetrator;[162] nor is the fact that the act was committed with barbarity;[163] or that the act was of an unnatural character.[164] And insanity cannot be inferred in a prosecution for crime merely from the oddness of the deed, or the daring manner in which it was committed.[165] The enormity of the crime, however, may be considered with other evidence in determining whether or not the accused was sane.[166] And while the homicide or other criminal act cannot be regarded as proof in itself of insanity, it is proper to examine it with all its attendant circumstances to determine whether it is most consistent with real or feigned insanity.[167]

Likewise, the mere fact that no motive for the homicide appears is not in itself sufficient to establish the insanity of the perpetrator.[168] And the same rule applies to the fact that there was little or no provocation.[169] But the presence or absence of a motive is a proper subject for consideration upon the question whether or not the accused was sane.[170] And motives for the crime, clearly shown, are strong evidence of sanity.[171]

The fact that a person is unable to discriminate between right and wrong so as to be criminally responsible is best ascertained by the acts and conduct of the individual himself;[172] and they are usually of more value than the opinions of witnesses, however learned or experienced they may be.[173] Acts, declarations, and conduct evidencing an aberration of mind may be sufficient to establish irresponsibility.[174] And any change in one's acts and conduct, and its extent and cause, and all other such circumstances, exhibited at or about the date of the crime, and previous thereto, are to be considered, and are entitled to more or less weight, according to their nature and their proximity to the act in question;[175] and a man's general habits constitute better evidence than particular acts.[176] The concealment of the crime and an endeavor to escape tend to show a knowledge of the nature of the offense, and ability to discriminate between right and wrong.[177] And evidence of preparation for the crime, and its commission pursuant to such preparation, shows criminal responsibility.[178] Likewise, the conduct of the

152 State v. Kluseman, 53 Minn. 541, 55 N. W. 741; Perry v. State, 87 Ala. 30, 6 So. 425.

153 Perry v. State, supra.

154 People v. Burgess, 153 N. Y. 561, 47 N. E. 889.

155 Murphy v. Com. 92 Ky. 485, 18 S. W. 163; People v. Clendennin, 91 Cal. 35, 27 Pac. 418; Armstrong v. State, 30 Fla. 170, 11 So. 618, 17 L.R.A. 484; Flanagan v. State, 103 Ga. 619, 30 S. E. 550, 11 Am. Crim. Rep. 525; R. v. Southey, 4 Fost. & F. 864

156 Murphy v. Com. supra.

157 State v. Lewis, 20 Nev. 333, 22 Pac. 241, 8 Am. Crim. Rep. 574.

158 Phelps v. Com. 17 Ky. L. Rep. 706, 32 S. W. 470.

159 People v. Schmitt, 106 Cal. 48, 39 Pac. 204.

160 Com. v. Wireback, 190 Pa. 138, 70 Am. St. Rep. 625, 43 Atl. 542.

161 Pienovi's Case, 3 N. Y. City Hall Rec. 123; Ferrers's Case, 19 How. St. Tr. 947.

162 Com. v. Buccieri, 153 Pa. 536, 26 Atl. 228; Singleton v. State, 71 Miss. 782, 42 Am. St. Rep. 488, 16 So. 295; State v. Coleman, 20 S. C. 441.

163 State v. Stark, 1 Strobh. L. 479; United States v. Lee, 4 Mackey, 489, 54 Am. Rep. 293.

164 Ball's Case, 2 N. Y. City Hall Rec. 85; Laros v. Com. 84 Pa. 200.

165 Com. v. Farkin, 2 Clark (Pa.) 208.

166 Com. v. Buccieri, 153 Pa. 535, 26 Atl. 228.

167 People v. Lake, 2 Park. Crim. Rep. 215; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; Binyon v. United States, 4 Ind. Terr. 642, 76 S. W. 265.

168 Com. v. Mosler, 4 Pa. 264; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; R. v. Dixon, 11 Cox, C. C. 341.

169 State v. Schaefer, 116 Mo. 96, 22 S. W. 447.

170 Com. v. Buccieri, supra; People v. Barber, 115 N. Y. 475, 22 N. E. 182; Keffer v. State, 12 Wyo. 49, 73 Pac. 556.

171 Shaw v. State, 32 Tex. Crim. Rep. 155, 22 S. W. 588.

172 United States v. Shults, 6 McLean, 121, Fed. Cas. No. 16,286.

173 State v. Thomas, Houst. Crim. Rep. (Del.) 511.

174 State v. Brinyea, 5 Ala. 241.

175 Cole's Trial, 7 Abb. Pr. N. S. 321; Massengale v. State, 24 Tex. App. 181, 5 S. W. 650, 6 S. W. 35.

176 Snook v. Watts, 11 Beav. 105; State v. Dreher, 137 Mo. 11, 38 S. W. 567.

177 United States v. Shults, supra; Lee v. State, 116 Ga. 563, 42 S. E. 759.

178 State v. O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L.R.A. 555; Lee v. State, 116 Ga. 563, 42 S. E. 759.

family of the person committing a crime may be considered on the question of his sanity, and evidence that he had previously been totally deranged, and that they had treated him as an insane person, is of considerable weight on the question of his insanity.[179] So, an attempt to commit suicide is not of itself evidence of insanity, but is to be considered together with the other acts and circumstances bearing on the question.[180] But mere eccentricity does not show insanity which will operate as an excuse for crime.[181] And an irritable temper and excitable disposition do not show insanity which will confer irresponsibility;[182] nor do suspicions of danger and apparent melancholy and peculiar deportment generally.[183] And a mere hallucination is not of itself evidence of insanity, though the inability to correct it may be.[184] And proof that the accused was illiterate, ignorant, and passionate does not justify an instruction as to insanity, and the admission of evidence of weak-mindedness;[185] nor does the fact that a person was deaf and dumb from infancy raise a presumption of idiocy.[186] And the fact that a person was a fit subject for treatment in an insane hospital, though evidence, is not conclusive of criminal irresponsibility.[187]

So, the mere fact that a cause existed which might produce insanity is not sufficient to establish criminal irresponsibility;[188] though it is sufficient to go to the jury with a definition of insanity in its legal sense.[189] And evidence that the accused was an epileptic, and that the tendency of that disease is to weaken the intellect and sometimes produce total insanity, is not sufficient to establish irresponsibility, where it failed to show that it had impaired his intellect to any serious extent.[190] But an instruction that the fact that the accused had been subject to epilepsy, and that epilepsy tends to produce insanity, is not sufficient to raise a reasonable doubt of his sanity, is erroneous, as tending to mislead and to interfere with the province of the jury to weigh the evidence.[191] And a defense may be made out upon evidence that the accused was suffering from an attack of epilepsy at the time, which rendered him unconscious, and capable of acting only automatically, without any design or purpose of committing the act.[192]

Nor is proof of hereditary insanity, or of a taint of insanity in the ancestors or family of a man, sufficient to relieve him from criminal responsibility, in the absence of actual insanity in himself.[193] But where there is evidence directly tending to prove insanity on the part of the accused, proof of hereditary insanity is admissible in corroboration thereof,[194] and as an additional link in the chain of circumstances.[195] But it is a mere circumstance, and before any inference can be drawn from it, the fact of insanity of the ancestors must be clearly established.[196]

## Conclusion.

In conclusion it may be said that, under existing systems of practice of criminal law, though the accused may be proved beyond a reasonable doubt to have done the killing or other act charged, and though it may appear to have been premeditated and with malice aforethought, still, if insanity incapacitating him from entertaining the criminal intent involved in the crime is proved, an element of the crime is lacking, and the verdict must be "not guilty." And while means are usually provided for confinement in asylums of persons found "not guilty because insane," we are not without demonstrative proof that frequently the guilty escape, and persons thus confined are able almost to monopolize the time of the courts in their efforts to escape, at a large cost to the state. This would be corrected under the suggested enactment. The man found "guilty, but insane," would be sentenced and confined, and would have to deal with the governor to get out, just as he would if he had been found "guilty" without the "but insane."

It would seem that this proposed enactment would be also of marked effect in the way of doing away with sham pleas of insanity. There would be no particular incentive to plead insanity if the culprit knew that he would be confined just as long, that his facilities for escape would be no greater, and that he would be a convicted felon in the one case as well as the other. And if a man shammed insanity, and procured a verdict of "guilty, but insane," confinement with lunatics for the whole term would not be undeserved punishment under the circumstances, and if he were really insane when the crime was committed, and afterwards recovered, the same official responsibility would rest on the governor as now rests upon him with reference to pardons; and we are authorized to expect that any governor so called upon to act will secure expert assistance in which he has confidence, and arrive at a correct conclusion.

179 Kinlock's Case, 25 How. St. Tr. 891, 997.
180 Coyle v. Com. 100 Pa. 573, 45 Am. Rep. 397; People v. Owens, 123 Cal. 482, 56 Pac. 251.
181 United States v. Young, 25 Fed. 710; Com. v. Meredith, 17 Phila. 90.
182 Sindram v. People, 1 N. Y. Crim. Rep. 448; Com. v. Cleary, 148 Pa. 26, 23 Atl. 1110; Hoover v. State, 161 Ind. 348, 68 N. E. 591.
183 State v. Shippey, 10 Minn. 223, Gil. 178, 88 Am. Dec. 70.
184 Com v. Meredith, supra.
185 Fitzpatrick v. Com. 81 Ky. 357.
186 State v. Howard, 118 Mo. 127, 24 S. W. 41.
187 Pflueger v. State, 46 Neb. 493, 64 N. W. 1094; Meyer v. People, 156 Ill. 126, 40 N. E. 490; Goodwin v. State, 96 Ind. 550.
188 Sawyer v. State, 35 Ind. 80; State v. Graviotte, 22 La. Ann. 587; McAllister v. Territory, 1 Wash. Terr. 360; Taylor v. United States, 7 App. D. C. 27.
189 R. v. Law, 2 Fost. & F. 836.
190 Com. v. Buccieri, supra; State v. Hayes, 16 Mo. App. 560; People v. Burgess, 153 N. Y. 561, 47 N. E. 889; Lovegrove v. State, 31 Tex. Crim. Rep. 491, 21 S. W. 191.
191 Guetig v. State, 63 Ind. 278, 3 Am. Crim. Rep. 233.
192 People v. Barberi, 12 N. Y. Crim. Rep. 89, 47 N. Y. Supp. 168.
193 Cole's Trial, supra; Bradley v. State, 31 Ind. 492; State v. Cunningham, 72 N. C. 469; State v. Kalb, 2 Ohio Leg. News, 364; Guiteau's Case, 10 Fed. 161.
194 State v. Cunningham, 72 N. C. 469; Com. v. Lutz, 10 Kulp, 234; Guiteau's Case, supra; R. v. Vyse, 3 Fost. & F. 247.
195 State v. Cunningham, supra.
196 People v. Pine, 2 Barb. 566; State v. Hockett, 70 Iowa, 442, 30 N. W. 742.

# Cross-Examination of the Perjured Witness

BY FRANCIS L. WELLMAN

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A DIFFICULT but extremely effective method of exposing a certain kind of perjurer is to lead him gradually to a point in his story, where—in his answer to the final question "Which?"—he will have to choose either one or the other of the only two explanations left to him, either of which would degrade if not entirely discredit him in the eyes of the jury.

The writer once heard the Honorable Joseph H. Choate make very telling use of this method of examination. A stockbroker was being sued by a married woman for the return of certain bonds and securities in the broker's possession, which she alleged belonged to her. Her husband took the witness stand and swore that he had deposited the securities with the stockbroker as collateral against his market speculations, but that they did not belong to him, and that he was acting for himself, and not as agent for his wife, and had taken her securities unknown to her.

It was the contention of Mr. Choate that, even if the bonds belonged to the wife, she had either consented to her husband's use of the bonds, or else was a partner with him in the transaction. Both of these contentions were denied under oath by the husband.

"Mr. Choate. When you ventured into the realm of speculations in Wall street, I presume you contemplated the possibility of the market going against you, did you not?

"Witness. Well, no, Mr. Choate, I went into Wall street to make money, not to lose it.

"Mr. Choate. Quite so, sir; but you will admit, will you not, that sometimes the stock market goes contrary to expectations?

"Witness. Oh, yes, I suppose it does.

"Mr. Choate. You say the bonds were not your own property, but your wife's?

"Witness. Yes, sir.

"Mr. Choate. And you say that she did not lend them to you for purposes of speculation, or even know you had possession of them?

"Witness. Yes, sir.

"Mr. Choate. You even admit that when you deposited the bonds with your broker as collateral against your stock speculation, you did not acquaint him with the fact that they were not your own property?

"Witness. I did not mention whose property they were, sir.

"Mr. Choate (in his inimitable style). Well, sir, in the event of the market going against you and your collateral being sold to meet your losses, *whom did you intend to cheat, your broker or your wife?"*

The witness could give no satisfactory answer, and for once a New York jury was found who was willing to give a verdict against the customer and in favor of a Wall street broker.

In the great majority of cases, however, the most skilful efforts of the cross-examiner will fail to lead the witness into such "traps" as these. If you have accomplished one such *coup*, be content

with the point you have made; do not try to make another with the same witness; sit down and let the witness leave the stand.

But let us suppose you are examining a witness with whom no such climax is possible. Here you will require infinite patience and industry. Try to show that his story is inconsistent with itself, or with other known facts in the case, or with the ordinary experience of mankind. There is a wonderful power in persistence. If you fail in one quarter, abandon it and try something else. There is surely a weak spot somewhere, if the story is perjured. Frame your questions skilfully. Ask them as if you wanted a certain answer, when in reality you desire just the opposite one. "Hold your own temper while you lead the witness to lose his" is a Golden Rule on all such occasions. If you allow the witness a chance to give his reasons or explanations, you may be sure they will be damaging to you, not to him. If you can succeed in tiring out the witness or driving him to the point of sullenness, you have produced the effect of lying.

But it is not intended to advocate the practice of lengthy cross-examinations, because the effect of them, unless the witness is broken down, is to lead the jury to exaggerate the importance of evidence given by a witness who requires so much cross-examination in the attempt to upset him. "During the Tichborne trial for perjury, a remarkable man named Luie was called to testify. He was a shrewd witness, and told his tale with wonderful precision and apparent accuracy. That it was untrue there could hardly be a question, but that it could be proved untrue was extremely doubtful and an almost hopeless task. It was an improbable story, but still was not an absolutely impossible one. If true, however, the claimant was the veritable Roger Tichborne, or at least the probabilities would be so immensely in favor of that supposition that no jury would agree in finding that he was Arthur Orton. His manner of giving his evidence was perfect. After the trial one of the jurors was asked what he thought of Luie's evidence, and if he ever attached any importance to his story. He replied that at the close of the evidence in chief he thought it so improbable that no credence could be given to it. But after Mr. Hawkins had been at him for a day, and could not shake him, I began to think, if such a cross-examiner as that cannot touch him, there must be something in what he says, and I began to waver. I could not understand how it was that, if it was all lies, it did not break down under such able counsel."

The presiding judge, whose slightest word is weightier than the eloquence of counsel, will often interrupt an aimless and prolonged cross-examination with an abrupt, "Mr. ——, I think we are wasting time," or, "I shall not allow you to pursue that subject further," or, "I cannot see the object of this examination." This is a setback from which only the most experienced advocate can readily recover. Before the judge spoke, the jury, perhaps, were already a little tired and inattentive and anxious to finish the case; they were just in the mood to agree with the remark of his Honor, and the "atmosphere of the case," as I have always termed it, was fast becoming unfavorable to the delinquent attorney's client. How important a part in the final outcome of every trial this atmosphere of the case usually plays! Many jurymen lose sight of the parties to the litigation—our clients—in their absorption over the conflict of wits going on between their respective lawyers.

It is in criminal prosecutions where local politics are involved, that the jury system is perhaps put to its severest test. The ordinary juryman is so apt to be blinded by his political prejudices that where the guilt or innocence of the prisoner at the bar turns upon the question as to whether the prisoner did or did not perform some act, involving a supposed advantage to his political party, the jury is apt to be divided upon political lines.

About ten years ago, when a wave of political reform was sweeping over New York city, the Good Government clubs caused the arrest of about fifty inspectors of election for violations of the election laws. These men were all brought up for trial in the supreme court, criminal term, before Mr. Justice Barrett. The

prisoners were to be defended by various leading trial lawyers, and everything depended upon the result of the first few cases tried. If these trials resulted in acquittals, it was anticipated that there would be acquittals all along the line; if the first offenders put on trial were convicted and sentenced to severe terms in prison, the great majority of the others would plead guilty, and few would escape.

At that time the county of New York was divided, for purposes of voting, into 1,067 election districts, and on an average 250 votes were cast in each district. An inspector of one of the election districts was the first man called for trial. The charge against him was the failure to record correctly the vote cast in his district for the Republican candidate for alderman. In this particular election district there had been 167 ballots cast, and it was the duty of the inspectors to count them and return the result of their count to police headquarters.

At the trial twelve respectable citizens took the witness chair, one after another, and affirmed that they lived in the prisoner's election district, and had all cast their ballots on election day for the Republican candidate. The official count for that district, signed by the prisoner, was then put in evidence, which read: Democratic votes, 167; Republican, 0. There were a number of witnesses called by the defense who were Democrats. The case began to take on a political aspect, which was likely to result in a divided jury and no conviction, since it had been shown that the prisoner had a most excellent reputation and had never been suspected of wrongdoing before. Finally, the prisoner himself was sworn in his own behalf.

It was the attempt of the cross-examiner to leave the witness in such a position before the jury that no matter what their politics might be, they could not avoid convicting him.

There were but five questions asked.

Counsel. You have told us, sir, that you have a wife and seven children depending upon you for support. I presume your desire is not to be obliged to leave them; is it not?

Prisoner. Most assuredly, sir.

Counsel. Apart from that consideration, I presume you have no particular desire to spend a term of years in Sing Sing prison?

Prisoner. Certainly not, sir.

Counsel. Well, you have heard twelve respectable citizens take the witness stand and swear they voted the Republican ticket in your district, have you not?

Prisoner. Yes, sir.

Counsel (pointing to the jury). And you see these twelve respectable gentlemen sitting here ready to pass judgment upon the question of your liberty, do you not?

Prisoner. I do, sir.

Counsel (impressively, but quietly). Well, now, Mr.——, you will please explain to these twelve gentlemen (pointing to jury) how it was that the ballots cast by the other twelve gentlemen were not counted by you, and then you can take your hat and walk right out of the court room a free man.

The witness hesitated, cast down his eyes, but made no answer, and counsel sat down.

Of course a conviction followed. The prisoner was sentenced to five years in state prison. During the following few days nearly thirty defendants, indicted for similar offenses, pleaded guilty, and the entire work of the court was completed within a few weeks. There was not a single acquittal or disagreement.

Occasionally, when sufficient knowledge of facts about the witness or about the details of his direct testimony can be correctly anticipated, a trap may be set into which even a clever witness, as in the illustration that follows, will be likely to fall.

During the lifetime of Dr. A. E. Ranney there were few physicians in this country who were so frequently seen on the witness stand, especially in damage suits. So expert a witness had he become that Chief Justice Van Brunt, many years ago, is said to have remarked, "Any lawyer who attempts to cross-examine Dr. Ranney is a fool." A case occurred a few years before Dr. Ranney died, however, where a failure to cross-examine would have been tantamount to a confession of judgment, and the trial lawyer having the case in charge,

though fully aware of the dangers, was left no alternative, and as so often happens where "fools rush in," made one of those lucky "bull's eyes" that is perhaps worth recording.

It was a damage case brought against the city by a lady who, on her way from church one spring morning, had tripped over an obscure encumbrance in the street, and had, in consequence, been practically bedridden for the three years leading up to the day of trial. She was brought into the court room in a chair, and was placed in front of the jury, a pallid, pitiable object, surrounded by her women friends, who acted upon this occasion as nurses, constantly bathing her hands and face with ill-smelling ointments, and administering restoratives, with marked effect upon the jury.

Her counsel, Ex-Chief Justice Noah Davis, claimed that her spine had been permanently injured, and asked the jury for $50,000 damages.

It appeared that Dr. Ranney had been in constant attendance upon the patient ever since the day of her accident. He testified that he had visited her some three hundred times, and had examined her minutely at least two hundred times in order to make up his mind as to the absolutely correct diagnosis of her case, which he was now thoroughly satisfied was one of genuine disease of the spinal marrow itself. Judge Davis asked him a few preliminary questions, and then gave the doctor his head and let him "turn to the jury and tell them all about it." Dr. Ranney spoke uninterruptedly for nearly three quarters of an hour. He described in detail the sufferings of his patient since she had been under his care, his efforts to relieve her pain, the hopeless nature of her malady. He then proceeded in a most impressive way to picture to the jury the gradual and relentless progress of the disease as it assumed the form of creeping paralysis, involving the destruction of one organ after another until death became a blessed relief. At the close of this recital, without a question more, Judge Davis said in a calm but triumphant tone, "Do you wish to cross-examine?"

Now the point in dispute—there was no defense on the merits—was the nature of the patient's malady. The city's medical witnesses were unanimous that the lady had not, and could not have, contracted spinal disease from the slight injury she had received. They styled her complaint as "hysterical," existing in the patient's mind alone, and not indicating nor involving a single diseased organ; but the jury evidently all believed Dr. Ranney, and were anxious to render a verdict on his testimony. He must be cross-examined. Absolute failure could be no worse than silence, though it was evident that, along expected lines, questions relating to his direct evidence would be worse than useless. Counsel was well aware of the doctor's reputed fertility of resource, and quickly decided upon his tactics.

The cross-examiner first directed his questions toward developing before the jury the fact that the witness had been the medical expert for the New York, New Haven, and Hartford Railroad thirty-five years, for the New York Central Railroad, forty years, for the New York & Harlem River Railroad twenty years, for the Erie Railroad fifteen years, and so on until the doctor was forced to admit that he was so much in court as a witness in defense of these various railroads, and was so occupied with their affairs, that he had but comparatively little time to devote to his reading and private practice.

Counsel (perfectly quietly). Are you able to give us, Doctor, the name of any medical authority that agrees with you when you say that the particular group of symptoms existing in this case points to one disease and one only?

Doctor. "Oh, yes, Dr. Erskine agrees with me.

Counsel. Who is Dr. Erskine, if you please?

Doctor (with a patronizing smile). Well, Mr. ——, Erskine was probably one of the most famous surgeons that England has ever produced. (There was a titter in the audience at the expense of counsel.)

Counsel. What book has he written?

Doctor (still smiling). He has written a book called "Erskine on the Spine," which is altogether the best-known work on the subject. (The titter among the audience grew louder.)

Counsel. When was this book published?

Doctor. About ten years ago.

Counsel. Well, how is it that a man whose time is so much occupied as you have told us yours is has leisure enough to look up medical authorities to see if they agree with him?

Doctor (fairly beaming on counsel). Well, Mr. ——, to tell you the truth, I have often heard of you, and I half suspected you would ask me some such foolish question; so this morning after my breakfast, and before starting for court, I took down from my library my copy of Erskine's book, and found that he agreed entirely with my diagnosis in this case. (Loud laughter at expense of counsel, in which the jury joined.)

Counsel (reaching under the counsel table and taking up his own copy of "Erskine on the Spine," and walking deliberately up to the witness). Won't you be good enough to point out to me where Erskine adopts your view of this case?

Doctor (embarrassed). Oh, I can't do it now; it is a very thick book.

Counsel (still holding out the book to the witness). But you forget, Doctor, that thinking I might ask you some such foolish question, you examined your volume of Erskine this very morning after breakfast and before coming to court.

Doctor (becoming more embarrassed and still refusing to take the book). I have not time to do it now.

Counsel. *Time!* why there is all the time in the world.

Doctor (No answer).

Counsel and witness eye each other closely.

Counsel (sitting down, still eying witness). I am sure the court will allow me to suspend my examination until you shall have had time to turn to the place you read this morning in that book, and can reread it now aloud to the jury.

Doctor (No answer).

The court room was in deathly silence for fully three minutes. The witness *wouldn't* say anything, counsel for plaintiff *didn't dare* to say anything, and counsel for the city *didn't want* to say anything; he saw that he had caught the witness in a manifest falsehood, and that the doctor's whole testimony was discredited with the jury unless he could open to the paragraph referred to which counsel well knew did not exist in the whole work of Erskine.

At the expiration of a few minutes, Mr. Justice Barrett, who was presiding at the trial, turned quietly to the witness and asked him if he desired to answer the question, and upon his replying that he did not intend to answer it any further than he had already done, he was excused from the witness stand amid almost breathless silence in the court room. As he passed from the witness chair to his seat, he stopped and whispered into the ear of counsel, "You are the ——est most impertinent man I have ever met."

After a ten days' trial the jury were unable to forget the collapse of the plaintiff's principal witness, and failed to agree upon a verdict.

# Editorial Comment

A brief review of current topics

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Edited by Asa W. Russell.

## *Waste*

THE conservation of our national resources is a growing demand of the times. We have been prodigally wasteful of nature's bounties,—wasteful in consumption, wasteful in management, and wasteful of ourselves.

The constant trend toward the centers of population has drawn from the agricultural districts its most virile stock to seek success, and generally to find oblivion in the maelstrom of our great cities. Scientific cultivation of the soil has been neglected, lands have been impoverished and wasted, and no provision made to assure an adequate food supply at reasonable prices.

Our public service corporations which minister to the indispensable wants of the community have, through competition and mismanagement, wasted millions of dollars, and too often furnished inferior service at exorbitant prices.

The high-geared machine of twentieth century civilization has made such tremendous drafts upon the nervous energy of men and women that we have developed among us weaknesses and diseases virtually unknown to our fathers. We are not only prodigal in this respect, as regards the present, but we mortgage the future of the race by sending children to toil in mill and shop. Insanity is said to have increased 100 per cent in fifty years, while drugs and drunkenness still scourge humanity like a pestilence. If this spendthrift policy continues we shall invite national disaster. Improved tillage, prudent husbandry of the national domain and resources, control of corporations, uniform excise and labor laws, and a more just distribution of the fruits of industry are subjects that may well engage the attention of our lawmakers, Federal and state.

## *Portrayal of Thought*

IT is claimed that it will soon be possible to watch the processes of thought on the moving picture screen. By new apparatus, which is being perfected, the man of science will be able to suggest an idea to his patient, and then observe the infinitesimal changes of the brain tissues which result upon thinking.

Dr. Max Baff, fellow of psychology at Clark University, in Worcester, makes known that a device now in preparation, by which the tiny brain cells may be magnified 500 times, will make thought actually visible to the eye. Light will be thrown on the problems of crime by this new achievement, he believes. A man's mental power may be measured to a nicety, and the mystery of the two great extremes in the mental scale, the brain of

the genius and the brain of the fool, will be solved.

"It is as if a new continent had been discovered," he says. "The exact place in the brain area where thought takes place is not yet known. By the moving pictures the riddle will be solved, I believe. Once we study the movement of the brain cells magnified 500 times, we will be able to gauge the capacity of a man's mind, and whether or not he is fitted for the work he is doing. By these means science will be able to discriminate between the fit and the unfit. We shall discover the criminal who commits the crime because he cannot help it, and on the other hand we shall be able to detect the criminal who is feigning insanity, for brain storms, in that they are a definite mental phenomenon, may be photographed."

## *Time and Chance*

"TIME and chance happeneth to them all." This is broadly true of our laws and courts. Our jurisprudence is not a fixed quantity, and the decisions of our tribunals are sometimes altered by unforeseen contingencies. A change in the personnel of the court has more than once been responsible for a change in the tenor of its decisions.

"The judgment now about to be given," said Justice Jeremiah Black on a certain occasion, "is one of 'death's doings.' No one can doubt that if Judge Gibson and Judge Coulter had lived, the plaintiff could not have been thus deprived of his property. . . . It is a melancholy reflection that the property of a citizen should be held by a tenure so frail. But 'new lords, new laws,' is the order of the day. Hereafter, if any man be offered a title which the Supreme Court has decided to be good, let him not buy it if the judges who made the decision are dead; if they are living let him get an insurance on their lives, for 'ye know not what a day or an hour may bring forth.'"

"The majority of this court," continued Judge Black, "changes once every nine years, without counting the chances of death and resignation. If each new set of judges shall consider themselves at liberty to overthrow the doctrines of their predecessors our system of jurisprudence (if system it can be called) would be the most fickle, uncertain, and vicious that the civilized world ever saw. A French Constitution, or a South American Republic, or a Mexican Administration, would be an immortal thing in comparison to the short-lived principles of Pennsylvania law."

It is a happy judicial faculty to know when resolutely to walk the ancient ways, and when the traditions of the past must be modified in their application to new conditions.

The theory which has applied always to the common law is that law ought to be mobile, and, to a certain extent, fluctuating. It ought to be pre-eminently, in a democracy, a progressive science. The essential rights of person and property are always the same, but the measures for the protection of those rights are not always the same.

We live in a new world,—one which is yet in a state of transition. The people demand measures for the cure of economic conditions which exist. They are taking unto themselves greater political power than they have ever before dreamt of exercising. They are bent upon establishing a better and stronger democracy.

The courts are playing, and will continue to play, a most important part in this movement. The process of reorganization which is now going on will bring before the courts many new questions, many important problems. It is for those who interpret the law to be broad as well as learned, wise as well as honest.

James Russell Lowell voiced good law as well as good verse when he penned the prophetic lines:

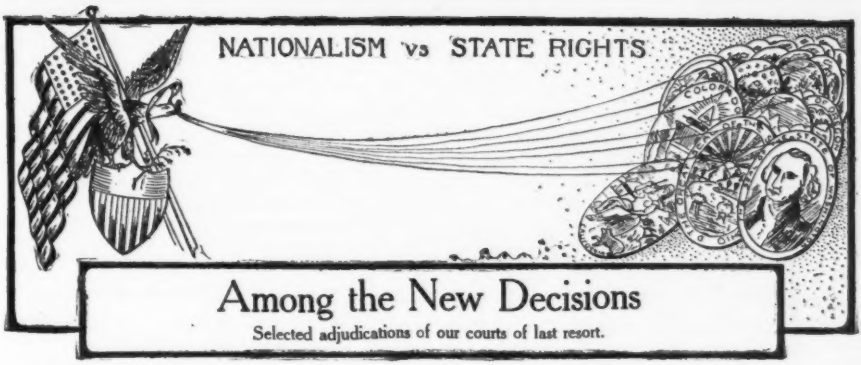
The world advances and in time outgrows
The laws that in our father's day were best;
And, doubtless, after us some purer scheme
Will be shaped out by wiser men than we,
Made wiser by the steady growth of truth.
. . . I have no dread of what
Is called for by the instinct of mankind.
Nor think I that God's world would fall apart
Because we tear a parchment more or less.
Truth is eternal, but her effluence,
With endless change, is fitted to the hour;
Her mirror is turned forward, to reflect
The promise of the future, not the past.

## *The Spreading Referendum*

Aside from Switzerland, writes Mr. Frederick Austin Ogg, in the Boston Evening Transcript, the United States is the only nation in which the twin principles of initiative and referendum have thus far been carried into practice on any considerable scale.

Beginning with South Dakota, in 1898, nine of our states have thus far established the legislative initiative and referendum in one or another form. In Utah the measure was proposed in 1899, and voted by the people in 1900, though for the lack of the necessary supplementary legislation it has not yet been put in operation. In Oregon the necessary proposals were made in 1899 and 1901, the adoption took place in 1902, and the validity of the system was affirmed in a supreme court decision of 1903. In Nevada the principles were ratified at the general election of 1904, though here again, by reason of constitutional technicalities, they are still inoperative. In Missouri similar proposals were made in 1903, resubmitted (after having been voted down) in 1907, and adopted in 1908. In Montana an initiative and referendum amendment was proposed in 1905, adopted in 1906, and given the necessary supplementary legislation in 1907. Delaware, is unique in being the only one of the states in which the people have never had an opportunity to vote immediately upon even a constitution or a constitutional amendment. In 1905, however, the legislature submitted to the voters the question as to whether there should be established at the next session a system of advisory initiative and advisory referendum. By a vote of seven to one the proposition was approved, November, 1906, and in 1907 the referendum was for the first time applied in a vote upon the question of whether or not liquor licenses should be granted within the three counties of the state.

At its session of 1907 the legislature of Maine adopted an elaborate proposal for a constitutional amendment providing for direct popular legislation, and at the state election of September, 1908, the amendment was ratified by a large majority. July 4, 1908, Oklahoma, entered the Union with a Constitution containing unusually elaborate provisions for the initiative and referendum, this being the first instance in which the system has been embodied in an original Constitution. In North Dakota the question is pending. An amendment was proposed in 1907, but has not yet reached the point of submission to the people, although of its eventual adoption there is very little doubt. Of the two states now entering the Union, one—New Mexico—has not incorporated the initiative-referendum in its Constitution, but the other—Arizona—is practically certain to do so. Illinois has a modified form of the initiative, established in 1901 by a law creating the so-called "public opinion" system, under which 25 per cent of the registered voters of any incorporated town, village, city, township, county, or school district may compel the submission of any local question to popular vote, and 10 per cent of the registered voters of the state may by petition secure the submission of a proposition to the electorate of the entire Commonwealth. Texas has a device of a somewhat similar sort.




# Among the New Decisions

Selected adjudications of our courts of last resort.

**Attachment—record information—rights.**—A question not previously presented to the courts for adjudication was considered in Jennings v. Lentz, 50 Or. 483, 93 Pac. 327, 29 L.R.A.(N.S.) 584, holding that information by one having the record title to real estate, that he has conveyed it to another, together with a record of a mortgage on the property from the latter to him, is not such evidence that the latter is the owner of the property that one relying upon it in purchasing the property from him would be regarded as a bona fide purchaser; and therefore an attaching creditor of the reputed grantee, who, by statute, has the status of such purchaser, acting upon such information, acquires no right to the property superior to that conferred by a prior unrecorded deed, which such grantee had executed and delivered to a stranger.

**Bank—lost check—duplicate—payment.**—The recent South Carolina case of Southern Seating & C. Co. v. First Nat. Bank, 68 S. E. 962, holds that where presentation of a check makes the bank liable therefor to the holder, one who, after giving a check, signs an order directing the bank to pay to the holder the amount of such check if it is still unpaid, takes the risk of the subsequent presentation of such check, and the bank may be required to pay both checks if the deposit account has funds.

The decision is logical, inasmuch as the drawer has it in his power to require an indemnity bond; and this position is supported by the few existing authorities upon the question, which are collated in a note appended to the report of the case in 29 L.R.A.(N.S.) 623.

**Bank—knowledge of officer—notice—individual dealing.**—The knowledge of an officer of a bank, who is also a member of its discount committee, and who offers to the bank a note which he had secured by fraud, but who withdraws from the committee meeting while the question of the acceptance of the note is under consideration, is held in Lilly v. Hamilton Bank, 178 Fed. 53, not imputable to the bank so as to prevent its enforcing the note.

As appears by the note accompanying the report of the case in 29 L.R.A.(N.S.) 558, a well-recognized exception to the general rule that a principal is chargeable with the knowledge acquired by his agent exists where the officers of a bank are personally interested in a transaction to which the bank is also a party in interest. The reason for the exception is that the officer will not be presumed to impart knowledge which is adverse to his own interest. Some cases do not recognize the exception to the general rule on account of the bank officer's interest, where such officer is the sole representative of the bank in the transaction, and the bank is held chargeable with the agent's knowledge, although it is personally interested. Thus, in the North Dakota case of Emerado Farmers' Elevator Co. v. Farmers' Bank, 127 N. W. 552, 29 L.R.A.(N.S.) 567, it is decided that in case the cashier of a banking institution who has the entire management, control, and conduct of its affairs, and stands as sole representative of

the bank in all transactions relating to the receipt and disbursement of the funds of depositors, while so acting, draws checks of an elevator company of which he is treasurer, payable to the bank, presents such checks as treasurer to himself as cashier, takes the sum of money paid over thereon, and misappropriates it, the bank for which he is acting will be held to knowledge of his fraudulent purpose at the time of presenting the checks, and cannot base thereon a claim of liability in its favor against the elevator company.

**Broker—procuring loan—purchase at judicial sale.**—Although there are many decisions on the general question whether an agent may purchase property of his principal at a judicial sale which he was employed to prevent, the case of Clark v. Delano, 205 Mass. 224, 91 N. E. 299, 29 L.R.A.(N.S.) 595, holding that the fact that a broker is employed to secure a loan to pay a mortgage does not prevent his becoming purchaser at the foreclosure sale in case he fails to secure the loan, is unique in its facts, and seems to be without any exact precedent.

**Carrier—lost freight—act of God—burden of proof.**—Whenever a carrier seeks to excuse itself for loss occurring on account of an act of God or some irresistible superhuman cause, it is held in Chicago, R. I. & P. R. Co. v. Logan, Snow & Co. 23 Okla. 707, 105 Pac. 343, that the burden of proof rests upon the carrier. This proposition is shown by the note accompanying this case in 29 L.R.A.(N.S.) 663, to state the well-settled rule. The only conflict of authority arises when the question is: Must the carrier relying upon such a defense as an act of God or *vis major* go further, and affirmatively show that there was no negligence or want of due care on its part but for which the goods would not have been injured or destroyed? Upon this question the decisions are conflicting, though the weight of authority seems to support the rule that it is incumbent upon the carrier to show that it used due diligence to carry the goods safely, and that the act of God or the *vis major* was the sole cause of the loss.

**Carrier—ejection of passenger from station—liability.**—A railroad company is held liable in the Texas case of Texas M. R. Co. v. Geraldon, 128 S. W. 611, for injury to a woman who has gone to its depot to take passage on a train, by the act of its agent in turning her out into a storm, with notice that she is in no condition to encounter it, although the reasonable time fixed by the company for closing the building has arrived.

From the note appended to this case in 29 L.R.A.(N.S.) 799, it appears that while there are but few decisions involving this particular question, it would seem that a general rule might be deduced from these cases, to the effect that, if a passenger is detained at the station through any cause for which the railroad company itself is responsible, then the railroad company is liable for any injuries received by reason of the passenger being turned out; but if the person comes to the station merely for his own convenience, at an unreasonable time before the departure of the train, then the company may enforce its rules, and turn the passenger out without incurring liability for damages received in consequence thereof.

**Citizenship—naturalization—alien wife.**—That an alien wife of an alien, both of whom are residing in this country, is not entitled to naturalization, is held in United States v. Cohen, — C. C. A. —, 179 Fed. 834, 29 L.R.A.(N.S.) 829. The question has apparently been considered in but two previous cases, both of which support the position taken in the Cohen Case.

**Corporation — succeeding partnership — liability for debts.**— Where the stockholders of a corporation formed by members of a pre-existing partnership, association, or firm include also third persons, the decisions seem agreed in holding that the corporation, in the absence of fraud or express agreement, cannot be held liable for the partnership debts. Thus, in Byrne Hammer Dry Goods v. Willis-Dunn Co. 23 S. D. 221, 121 N. W. 620, annotated in 29 L.R.A.(N.S.) 589, it is held that a corporation which continues the business of an insolvent partnership

is not, in the absence of fraud, liable for its debts, where it is organized by the former partners, who pay for their stock by insurance money collected for the destruction of the partnership assets by fire, and a stranger, who, with knowledge of the facts, contributes cash equal to that of each partner, each contributor taking a *pro rata* share of stock for his contribution.

**Disorderly house—official sanction—liability of officer.**—A novel question was presented in the Arkansas case of State v. Lismore, 126 S. W. 855, annotated in 29 L.R.A.(N.S.) 721, which holds that members of a city council who pass an ordinance providing for the licensing of bawdyhouses do not become participants in the keeping of houses kept under the resolution, so as to render themselves liable to punishment as such keepers.

**Divorce—desertion—forcing spouse to leave home.**—Whether a spouse who forces the other to leave home thereby deserts the latter, is considered in the Florida case of Hudson v. Hudson, 51 So. 857, annotated in 29 L.R.A.(N.S.) 614, in which it is held, in a suit for divorce upon the ground of wilful, obstinate, and continued desertion, for the statutory period, that it is immaterial which of the married parties leaves the marital home, the one who intends bringing the cohabitation to an end commits the desertion; that the party who drives the other away is the "deserter," and that a wife may drive her husband away.

**Domicil—distribution of estate—jurisdiction.**—The possibility of an American citizen acquiring a domicil of choice in that part of a foreign country over which, by treaty, the United States is permitted to extend its own law so far as the property rights of its citizens are concerned, was considered in Mather v. Cunningham, 105 Me. 326, 74 Atl. 809, holding that a domicil of testacy or intestacy may be established by a citizen of one of the United States in that portion of China in which, by treaty, he is permitted to enjoy the laws of the United States, so that in case of his death his estate is subject to the jurisdiction of the consular court there located, and not to the courts of the state of his former domicil.

**Dower—land purchased for railroad gravel pit.**—That a railroad does not take land purchased for a gravel pit free from the right of the grantor's wife to dower, although it so far devotes the land to public use as to secure therefrom materials for its roadbed, is held in the Maine case of McAllister v. Dexter & P. R. Co. 76 Atl. 891, which is accompanied in 29 L.R.A.(N.S.) 726, by a note setting forth the decisions on right to dower in land purchased by a railroad company.

**Druggist—duty—care required.**—The ordinary care which a druggist is bound to exercise in the filling of prescriptions is held in the recent Maine case of Tremblay v. Kimball, 77 Atl. 405, to be the highest possible degree of prudence, thoughtfulness, and diligence, and the employment of the most exact and reliable safeguards consistent with the reasonable conduct of the business, in order that human life may not be exposed to the danger following from the substitution of deadly poisons for harmless medicines. As appears by the note appended to this case in 29 L.R.A.(N.S.) 900, there is no conflict of authority as to the duty required of a druggist in his dealings with his customers. All the decisions support the principle enunciated in Tremblay v. Kimball, that while the law requires of a druggist only reasonable and ordinary care in compounding prescriptions, in selling medicines, and in performing the other duties of his profession, such care with reference to him means the highest degree of prudence, thoughtfulness, and diligence, and is proportioned to the danger involved; and that a breach of such duty would be negligence rendering him liable for injuries resulting therefrom.

**Evidence—corporate books—privacy.**—It is determined in the recent Washington case of Re Bolster, 110 Pac. 547, that the officers of a corporation cannot refuse to produce its books in court for inspection, in response to a subpœna in a cause

in which the matter contained in them is material, on the theory that the privacy with which its business is carried on is a trade secret, which it is entitled to protect from the inspection of strangers. This decision is accompanied in 29 L.R.A.(N.S.) 716, by a note collating the cases upon refusal to produce books or papers in response to subpœna, upon the ground that they contain private matter.

**Evidence—expert testimony—predicating upon opinions.**—In conformity with the general rule that it is not proper, in asking hypothetical questions, to incorporate in them the opinions of other expert witnesses, for the reason that an opinion of a witness must rest upon the facts, it is held in the Rhode Island case of Kearner v. Charles S. Tanner Co. 76 Atl. 833, annotated in 29 L.R.A.(N.S.) 537, that hypothetial questions to expert witnesses cannot be predicated upon the opinion of witnesses as to the possible cause of an explosion in a starch factory.

**Indemnity—insurance—physical capacity—right to recover.**—An injury which wholly incapacitates a manual laborer from performing any and every kind of business which he is able to do or capable of engaging in is held in the Arkansas case of Industrial Mut. I. Co. v. Hawkins, 127 S. W. 457, 29 L.R.A. (N.S.) 635, to be within the terms of a policy providing an indemnity for an injury which shall wholly disable and prevent him from prosecution of any and every kind of business, although the injury would not prevent his doing mental work if he was fitted to do it.

This decision is in accord with the great weight of authority as set forth in the note in 38 L.R.A. 529, on what constitutes disability within the meaning of accident or health policies, and the supplemental note thereto in 23 L.R.A. (N.S.) 352. This case illustrates clearly the unjust and unreasonable extent to which the courts would be required to go if a literal construction was given to the language used. The intention of the parties in making the contract is the question of importance to be considered. It clearly never was within the contemplation of the insured, an ignorant day laborer, when he entered into the contract, that he should not be entitled to receive benefits providing the injury received left him in such a condition that, upon acquiring an education, he might follow some vocation requiring only mental labor. And it is almost equally as clear that the insurer had no such understanding at the time that the policy was issued.

**Marriage—solemnization—person under age.**—The decision reached in the recent New Mexico case of Territory v. Harwood, 110 Pac. 556, that ignorance by the officiating officer that the parties married by him were under age constitutes no defense to a prosecution for unlawfully uniting them in marriage, is supported by the few cases which have passed upon the question, as appears by the note appended to the report of the Harwood Case in 29 L.R.A.(N.S.) 504.

**Master—act of chauffeur—disobedience of orders.**—The responsibility of the owner of an automobile for the negligence of his chauffeur while the car is out at the direction of a member of his family, but in disobedience to the owner's orders, seems to have been considered for the first time in Moon v. Matthews, 227 Pa. 488, 76 Atl. 219, 29 L.R.A.(N.S.) 856, holding that the mere fact that a chauffeur in taking out his master's automobile in obedience to a command of the master's family, for the entertainment of friends and guests of the family, disobeys the master's command not to take out the car unless the master accompanies it, does not show that he is acting outside the scope of his employment, so as to relieve the master from liability for injury done by the negligent handling of the car.

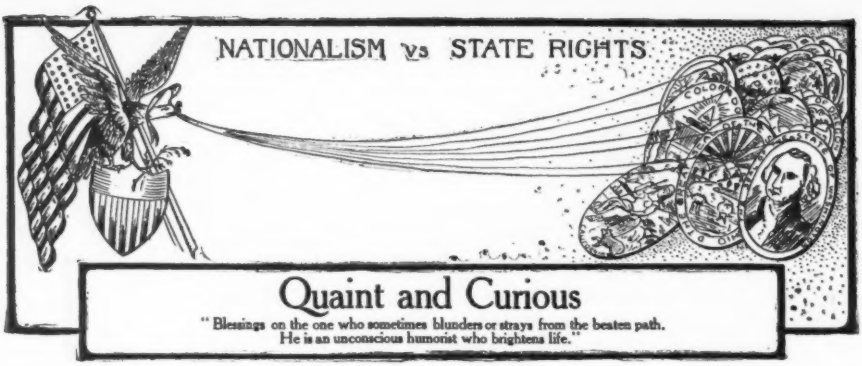
**Master—mooring raft in river—duty to supervise.**— The question of the duty of the master to furnish a competent superintendent where the work to be done by the servant is complicated and also dangerous has been passed upon by but few cases; yet there appears to be a well-defined rule to the effect that the master will be held liable for injuries to a serv-

ant caused by the master's failure to furnish a competent superintendent where the work is complicated and dangerous, and requires, in order to be done with safety, the supervision of an experienced and competent superintendent. Thus, it is held in the recent Washington case of Engelking v. Spokane, 110 Pac. 25, annotated in 29 L.R.A.(N.S.) 481, that a master must furnish a skilled superintendent, where he directs common laborers to construct a raft and moor it in the current above falls in a river as a platform upon which to perform labor, failure to do which will render him liable for the death of the laborers, in case the current tears the raft from its moorings and sweeps them over the falls.

**School—religious exercises—public funds.**—Requiring school children to listen to the reading of passages of the King James' version of the Bible, and to join in repeating the Lord's Prayer and in singing hymns, is held in People ex rel. Ring v. Board of Education, 245 Ill. 334, 92 N. E. 251, 29 L.R.A.(N.S.) 442, to violate their constitutional right to the free exercise and enjoyment of religious profession and worship. It is also determined that the reading of the King James' version of the Bible, repeating the Lord's Prayer, and singing hymns as part of the exercises of a public school, violates a constitutional provision forbidding the appropriation of any public fund or the donation of money by the state in aid of sectarian purposes. This is apparently the only case which has passed upon the right to give religious instruction or exercises in public schools, decided since Church v. Bullock, 16 L.R.A. (N.S.) 860, to which is appended a note upon the subject. From the cases there collated it appears that the courts are not agreed as to what religious exercises or instruction in public schools are within the prohibitions of the various state Constitutions, defining religious liberty, and forbidding the use of public moneys for religious teaching, or for the support of religious sects or societies.

**Telegraph—delivery of message by telephone.**—The question of the duty of telegraph companies to deliver messages by telephone has not been frequently before the courts for decision. The case of Western U. Teleg. Co. v. Price, 137 Ky. 758, 126 S. W. 1100, annotated in 29 L.R.A.(N.S.) 836, holds that a telegraph company which receives an important message after the hours during which it maintains a messenger service must, in case it is connected with the residence of the addressee by telephone which it can use without expense, make reasonable effect to deliver the message by that means.

**Usury—loan of bonds.**—The reservation of more than the legal rate of interest for the loan of bonds which are subject to fluctuation on the market is held in Title Guaranty & S. Co. v. Klein, 178 Fed. 689, not within a statute making void any contract by which shall be reserved more than the legal rate for the loan or forbearance of money, goods, or other things in action. From the note appended to this case in 29 L.R.A.(N.S.) 620, it appears that the cases are almost unanimous in holding that the usury laws do not apply to loans other than of money, so long as they do not constitute a shift or cover for a loan of money. It also seems that the usury statutes are inapplicable, when the subject-matter of the loan is of fluctuating value, and the amount of profit derived depends upon contingencies.




# Quaint and Curious

"Blessings on the one who sometimes blunders or strays from the beaten path.
He is an unconscious humorist who brightens life."

**No Nolle Pros. for Her.**— "I'll *nolle pros.* this case," said an assistant city attorney in St. Louis, when a negress was arraigned in Dayton street police court recently, on a charge of having discharged firearms. The defendant didn't want to hear any more, for *nolle pros* she understood to be a lawyers' term for "hanged by the neck." She fled from the court room, startling the whole neighborhood with her screams. She was almost white from fear when the police captured her and brought her back to the court. After learning that the *nolle pros.* set her free, she departed gleefully.

"Ah sho' thought Ah was gonna git hung," she said.

**The Lure of the Spheroids.**— Elebristo Gonzales, the sixteen-year-old husband of Margarita Gonzales, fourteen years old, got a hearing in the juvenile court, Los Angeles, charged with failing to support the wife of his infancy. The two children were married several months ago, in San Miguel, Mexico. An officer of the Humane Society said the young husband has done little since he reached the city except to play marbles, winning the title of champion in that game at the Alameda Courts. The lure of the spheroids had caused him to forget the responsibilities of life and the necessity of providing for his own. It was evidently a pronounced case of the "marble heart." Judge Wilbur released the boy on his promise to attend to his duties.

**Functus Officio.**— The final report made by a guardian in Iowa in response to a request by the clerk of probate is so unusually brief as to deserve mention. It reads: "Said ward———has become of age, and is able to take care of his own interests. Therefore my guardianship has expired."

**He Mortgaged His Heifer.**— Not every roan calf has attained the distinction of being mortgaged by use of all the time-honored phraseology employed where real estate is encumbered. But this is exactly what happened to a heifer calf in Idaho. Perhaps the draughtsman ran out of chattel mortgage blanks; possibly he classified the animal as a chattel real, and reasoned that it was immaterial which form he followed. Anyway, this is what he wrote:

"This Indenture Made the third day of December in the year of our Lord, one thousand nine hundred and eight between A. B. of ———, County of———, State of Idaho, part of the first part, and C. D. of———, County of———, State of Idaho, the part of the second part,

"Witnesseth, That the said part of the first part for and in consideration of the sum of Twelve————Dollars, do ——by these presents Grant, Bargain, Sell and Convey unto the said part of the second part, and to their heirs and assigns forever, all that certain chattel property situate in the County of——— and State of Idaho, and bounded and particularly described as follows, to-wit:

"One heifer calf; Said calf is roan color and Branded with an R on the right ribs——together with the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

"And said part of the first part hereby agree to keep the Heifer on said premises fully insured against loss by fire in some reliable fire insurance company, with loss, if any, payable to the part of the second part as mortgagee ——, as ———interest may appear.

"This Grant is intended as a mortgage to secure the payment of one certain promissory note——of even date herewith, executed and delivered by the said A. B. to the said part of the second part C. D.

"And these presents shall be void if such payments be made. But in case default shall be made in the payment of said principal sum——, of money or any part thereof as provided in the said note ——, or if the interest be not paid as therein specified, then it shall be optional with the said part——of the second part their executors, administrators or assigns to consider the whole of said principal sum——expressed in said note ——as immediately due and payable; and immediately to enter into and upon all and singular the above described premises, and to sell and dispose of the same according to law, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said promissory note—, together with the costs of foreclosure suit, including——— counsel fees and also the amounts of all such payments of taxes, assessments, incumbrances or insurance as may have been made by said second part their heirs, executors, with the interest on the same, rendering the overplus of the purchase money (if any here shall be) unto the said ———part of the first part,———heirs, executors, administrators or assigns.

"In Witness Whereof, the said part of the first part has hereunto set his hand ——and seal——the day and year first above written.

Signed, Sealed and Delivered in the presence of ————A. B. (Seal)

**A Legal Zoo.**— Animals of various kinds have been having their day in court.

That no fish were on the ark with "Father Noah," and that therefore the creature is not an animal, was the position taken by a St. Louis city attorney in nolle prossing the case against a peddler accused of cruelty to animals. The case was dismissed over the emphatic protest of Judge Pollard, who argued that the dictionary defined a fish as an animal. The peddler was charged with advertising his fish by displaying a live animal from a string on his cart, that its flopping might attract the eyes of prospective purchasers.

"A fish is not an animal," rules the associate city attorney of St. Louis, says the Cleveland Plain Dealer, "because there wasn't any fish in Noah's ark. According to the same line of reasoning, a lawyer is not a righteous person."

There can be no doubt, however, that a monkey is an animal of high degree. A five pound simian slumbered peacefully in his cage at the Kentucky State Fair Grounds a few months ago, while four prominent local attorneys fought a wordy battle in the magistrate court as to whether state fair visitors should be permitted to amuse themselves by throwing balls at the monkey. To champion his cause and see that justice was done to little Jocko, half a dozen prominent Louisville club women were present. After an hour and a half of testimony and legal oratory about Darwin, "monkey prostration," "nervous fatigue," and other things that the ordinary layman would not believe a monkey was heir to, the magistrate decided that the owner should pay a fine of $25 for letting the visitors to the fair make his monkey a target for rubber balls.

That is is against the Ohio law to hold bald-headed eagles in captivity was the ruling received from Attorney General Hogan by Elmer Fawcett, a Logan county farmer. Fawcett had one of the birds, and the Attorney General ordered its release. The big eagle was taken after a fierce fight several weeks ago. Fawcett discovered it with its talons fastened in the woolly back of a lamb, seized a pitchfork, and captured the bird after a lively struggle. The attorney general holds that a native eagle cannot be held captive in Ohio. This ruling ought to stand. To permit the "bird of freedom," the storied emblem of our national great-

ness, to pine in captivity, would seem like sacrilege.

Can a goose suffer from mental anguish? Has a goose feelings? If so, where are they located, or not located?

These are questions which are puzzling a North Carolina justice in arriving at conclusions of fact and law in a goose case presented for his consideration by a warrant sworn out by officers of the Society for the Prevention of Cruelty to Animals.

In a certain barnyard an agent of the S. P. C. A. discovered a goose whose webbed feet were nailed to a board, as one stage in the process to make its liver become *pate de foie gras*.

A meeting of the society was held to consider the case, and the president, who had been in conference with physicians, encyclopedias, lawyers, humanitarians, and others, insisted that, in addition to the bodily injury, there was also the question of mental anguish to be considered. Accordingly, the society voted to hale the goose's owner to court to decide a goose's right.

The much disputed question, "Is a hen a bird?" which the treasury officials passed up as hopeless, has been presented to the new court of customs appeals. The question is, If birds' eggs are free under the tariff, and hens' eggs are taxed five cents a dozen, why isn't a hen a bird? An importer who paid the duty wants to know.

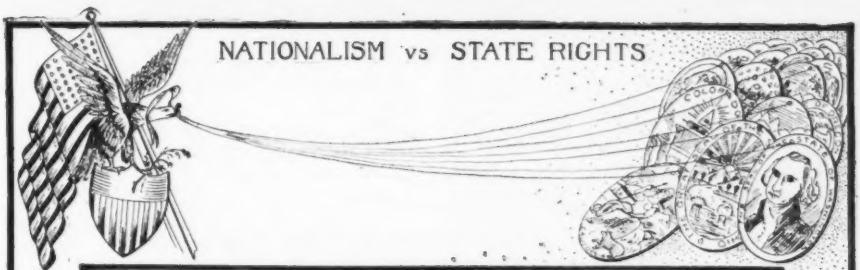
"I direct that after my demise my parrot be chloroformed,"' says a will not long since probated in Washington, District of Columbia. It does not appear whether the executor carried out the request. The testatrix may have thought the painless exit of "Poor Poll" preferable to a continued existence in dependence upon the charity of strangers. Or she may have been moved by the sentiment which animated Norse and Indian chiefs to direct the sacrifice on their tombs of their war horses, wives, and slaves, that they might take their most cherished possessions with them into the land of shades.

**Widows—Grass and Sod.**—On a recent trial a witness denied that she had told a certain man when he met her that she was a widow. "I told him I was a grass widow," she asserted. The lawyers argued as to the exact meaning of that term. Thereupon Justice Guy handed down this luminous definition:

"There are two kinds of widows—grass and sod. The sod species—sometimes known as the common or garden variety of widow—is relieved of the burdens of a spouse. The grass widow has a husband on her hands, but cannot put said hands upon him.

**Cure by Silence.**—Two Minneapolis boys were recently ordered by Judge C. L. Smith in municipal court not to speak to each other for a year. In this instance the court probably had in mind the admonition that "evil communications corrupt good manners." The boys were under arrest, charged with disorderly conduct. The probation officer told the judge that he had received complaints about their conduct. After listening to the officer's story, Judge Smith sentenced the boys to sixty days in the workhouse. He suspended sentence, and put them on the most rigid term of probations ever laid down in Hennepin county. Judge Smith told the boys that they must not speak to each other during the period of probation; that they must stay home nights, keep away from pool rooms and saloons, and attend night school.

The New York supreme court justice who issued an injunction restraining a farmer from speaking to his wife for thirty days, pending a hearing on the wife's application for alimony and counsel fees in her suit for separation, doubtless proceded on a different theory. He may have had in mind the lover's philosophy, that absence makes the heart grow fonder. The defendant, accompanied by his counsel, visited the domicil of his wife and daughter several times while the injunction order was in force, and ate meals with them, but the rule of "silence" was rigidly obeyed.




# New Books and Recent Articles

## Recent Books of Interest to Lawyers

"Celebrated Criminal Cases of America."—By Captain Thomas S. Duke (The James H. Barry Company, San Francisco, Cal.). $3 net. 657 pp.

This volume may be called a criminal history of the United States for the last sixty years or more. It records in an interesting manner a series of noted crimes, each of which in its day attracted wide attention and comment. In all, one hundred and ten cases are set forth, giving with historical fidelity the details of murders, robberies, forgeries, and swindling exploits perpetrated by the greatest criminals of modern times.

In his introduction, Captain Duke explains that his effort was intended as a compendium of cases illustrating the unusual craft and cunning of the criminal, rather than an attempt at style, and hints at a theory that crime in most cases is hereditary. To support this he has, where possible, given a short sketch of the antecedents of the criminal. As an instructive work it makes a sincere effort to deal with the elaborate police system of the country, and gives an insight into the machinery of justice.

There are over one hundred excellent photographs of notorious criminals, in addition to pictures of celebrated American detectives.

The concise and impartial manner in which the facts of each case are presented renders the work of value to lawyers, criminologists, police officials, and psychologists, as well as to the general reader.

This book, although not didactic, contains the unspoken moral that the wages of crime are pitiful, and that retribution follows the wrongdoer like a shadow.

Crime is essentially base and brutal. There is nothing so likely to strip notorious villians of the glamour of romance with which they may have been clothed by the unthinking, as a plain recital of the events in which they participated. The bandit, bravo, or thug cuts but a sorry figure at best, and in the light of unvarnished facts is despicable.

Captain Duke has performed a valuable service in impartially depicting the criminal as he is. He has also portrayed some characters we may admire, the resolute, undaunted men who, without thought of fame or hope of reward, took their lives in their hands, and too often lost them in defense of law and order.

Atwell's "Federal Crimnial Law."—1 vol. $ 5.

Elliott, "Roads and Streets."—3d ed. 2 vols. Buckram, $ 13.

Street, "Personal Injuries."— (Texas) 1 vol. $6.

Stewart, "Taxation."— (Texas) 1 vol. $6.

"Vermont Digest Annotated."— (1789-1910), covering N. Chipman to vol. 83 Vermont. 3 vols. Buckram or sheep, $21.50.

# Recent Legal Articles in Journals and Magazines

**Aliens.**

"The Immigration Act and Returning Resident Aliens."—59 University of Pennsylvania Law Review, 359.

**Appeal.**

"The Establishment of Judicial Review, II."—9 Michigan Law Review, 283.

"The English Court of Criminal Appeal."—5 Illinois Law Review, 389.

**Attorneys.**

"Contingent Fees."—42 National Corporation Reporter, 20.

"Codes of Ethics and Their Enforcement."—42 National Corporation Reporter, 46.

"The Practice of Law in Quebec Province, Canada."—9 Michigan Law Review, 317.

**Aviation.**

"Aviation and Future Legislation."—36 Law Magazine and Review, 176.

**Bankruptcy.**

"Bankruptcy Law."—4 Maine Law Review, 132.

**Banks.**

"Senator Aldrich's Reserve Association Plan."—28 Banking Law Journal, 105.

**Bills and Notes.**

"The Negotiable Instruments Law."—28 Banking Law Journal, 115.

**Burial.**

"Rights of Burial."—75 Justice of the Peace, 62.

**Codes.**

"The Need for Codifying the Law of England."—36 Law Magazine and Review, 129.

**Commerce.**

"The Pseudo-Doctrine of the Exclusiveness of the Power of Congress to Regulate Commerce."—20 Yale Law Journal, 297.

"The Gibbons v. Ogden Fetish."—9 Michigan Law Review, 324.

**Conservation.**

"Some Recent Experiments in Human Conservation."—122 Harper's Monthly Magazine, 515.

**Conspiracy.**

"Conspiracy in Civil Actions."—36 Law Magazine and Review, 151.

**Constitutional Law.**

"Administrative Exercise of the Police Power."—24 Harvard Law Review, 268.

"Does an Amendment in the Law, Changing the Manner of Apportioning Assessments for Municipal Improvements, Impair any Vested Right of Either the Contractor, the Property Owners, or the Municipality?"—72 Central Law Journal, 97.

"A Convention to Amend the Constitution."—193 North American Review, 369.

**Corporations.**

"National Incorporation."—5 Illinois Law Review, 414.

"National Control of Corporations."—11 The Brief, 3.

"Corporate Personality."—24 Harvard Law Review, 253.

"Norman Corporations v. Continental Monopolies—Brief for Plaintiffs."—72 Central Law Journal, 132; 11 The Brief, 65.

**Counterfeiting.**

"Great Cases of Detective Burns: The Monroe-Head Counterfeit."—36 McClure's Magazine, 542.

**Courts.**

"English and American Administration of Justice."—17 Case and Comment, 487.

"A Non-Partisan Judiciary."—4 Lawyer & Banker, 30.

"The Gilbert Court Bill."—42 National Corporation Reporter, 45.

**Covenants and Conditions.**

"Promises and Covenants."—36 Law Magazine and Review, 141.

**Criminal Law.**

"Criminal Statistics, 1909."—75 Justice of the Peace, 74.

"The Case against Patrick."—17 Case and Comment, 498.

"The Unwritten Law."—17 Case and Comment, 503.

"The Third Degree Illegal."—4 Lawyer and Banker, 6.

"Indictable Offense and Summary Jurisdiction."—75 Justice of the Peace, 50.

"The Discharge of a Jury before Verdict."—75 Justice of the Peace, 62.

"Reasons for Retaining the Death Penalty."—42 National Corporation Reporter, 21.

**Criminal Slang.**

"Criminal Slang."—17 Case and Comment, 506.

**Debtor and Creditor.**

"Mercantile Co-operation for Legal Self-Defense."—5 Illinois Law Review, 431.

**Divorce.**

"The Evidence of Divorce."—4 Maine Law Review, 103.

**Elections.**

"The Present Status of Direct Nominations."—5 Illinois Law Review, 403.

**Evidence.**

"Evidence—Issue of Forgery."—72 Central Law Journal, 135.

**Homicide.**

"Insanity as a Defense in Homicide Cases."—17 Case and Comment, 491.

**Husband and Wife.**

"When, as between Husband and Wife, does Either, as Disseisor, Acquire Title?"—4 Lawyer and Banker, 36.

**Indictment.**

"The Seventeenth Century Indictment in the Light of Modern Conditions."—24 Harvard Law Review, 290.

**Law.**

"The Humanity of the Law."—17 Case and Comment, 495.

"The Mission and Objects of Philosophy of Law."—5 Illinois Law Review, 423.

**Law Reform.**

"The Cry for Law Reform."—20 Yale Law Journal, 292.

**License.**

"Licenses for Male Servants."—75 Justice of the Peace, 50.

**Master and Servant.**

"Workmen's Compensation Act."—42 National Corporation Reporter, 9.

"Model Employers' Liability Act."—4 Lawyer and Banker, 17.

**Monopoly.**

"The Prevention of Industrial Monopolies."—4 Lawyer and Banker, 42.

**Moral Duty.**

"The Moral Duty to Aid Others as a Basis of Both Civil and Criminal Liability."—17 Kansas Lawyer, 171.

**Navy.**

"Will Congress Put Our Navy on the Sea?"—36 McClure's Magazine, 523.

**Negligence.**

"Trespassers will be Compensated."—30 Law Notes (Eng.), 50.

"The Rule in Rylands v. Fletcher."—59 University of Pennsylvania Law Review, 373.

**Panama Canal.**

"Canal Zone Laws and Judiciary."—11 The Brief, 49.

**Peace.**

"The Dawn of the World's Peace."—21 The World's Work, 14128.

**Pensions.**

"The Pension Carnival: 'Correcting' Records of the Dishonorably Discharged."—21 The World's Work, 14159.

**Poor and Poor Laws.**

"The Prevention of Destitution."—36 Law Magazine and Review, 181.

"Children and Residential Settlements."—75 Justice of the Peace, 73.

**Practice and Procedure.**

"Reforming Practice Act."—43 Chicago Legal News, 237.

"Address of Mr. Edgar B. Tolman, President of the Illinois Conference on the Reform of the Law of Procedure and Practice."—43 Chicago Legal News, 238.

**Precedent.**

"The Decadence of the System of Precedent."—24 Harvard Law Review, 298.

**Principal and Agent.**

"The Liability of an Agent to Third Persons in Tort."—20 Yale Law Journal, 239.

**Public Lands.**

"Southern Pacific Lands."—4 Lawyer and Banker, 11.

**Treaties.**

"The Sanctity of Treaties."—20 Yale Law Journal, 268.

**Trusts.**

"Some Considerations Concerning Investments by Trustees."—24 Bench and Bar, 57.

**Uniform Legislation.**

"The Relation of Judicial Procedure to Uniformity of Law."—72 Central Law Journal, 114.

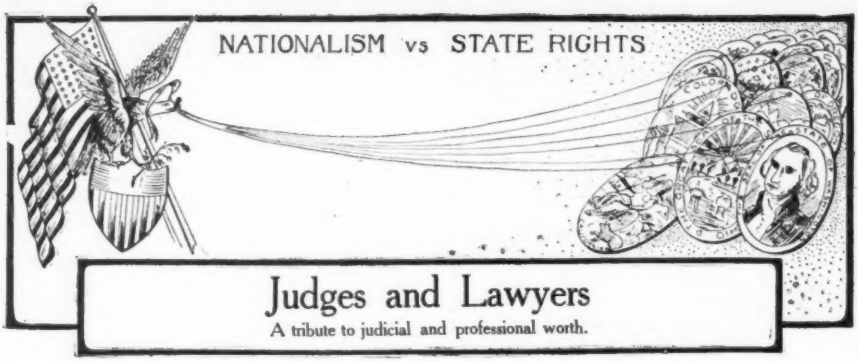
**Unwritten Law.**

"The Unwritten Law."—17 Kansas Lawyer, 163.

**Witnesses.**

"Cross-Examination of the Perjured Witness."—17 Case and Comment, 509.

"Expert Appointed by the Court."—42 National Corporation Reporter, 9.




# Colorado's U. S. Senator and Prominent Mining Lawyer Dies

CHARLES J. Hughes, Jr., junior United States Senator from Colorado, died at his home in Denver on January 11th, after a long illness.

Mr. Hughes was born in Kingston, Missouri, February 16, 1853, his father being an attorney, and a descendant from Kentucky pioneers who came there from Virginia.

Senator Hughes graduated from Richmond College in 1871, and studied at the University of Missouri in 1872 and 1873. In after years he received the degree of LL.D. from both the University of Missouri and the University of Denver.

HON. CHARLES J. HUGHES, JR.

A thorough student, the future Senator supplemented his education with studies in higher mathematics, languages, political economy, and the sciences most intimately connected with his legal practice, including engineering, chemistry, geology, ore deposition, irrigation, and hydraulic engineering.

After graduation, Mr. Hughes spent five years in teaching public schools and as a college professor, but abandoned teaching for the practice of the law in 1877, coming in that year to Colorado.

He built up an extensive practice not limited to any field or class of clients, but embracing all save criminal law, which he avoided whenever possible. His success in law was the reward of his record as a careful, painstaking lawyer in counsel and preparation of cases for trial, for strength, force, and earnestness in the court room, a remarkable mastery of the difficult art of cross-examination, and a clear, forcible, and convincing address in argument.

From the beginning, Senator Hughes gave special attention to mining and irrigation litigation. He delivered an address on the Evolution of Mining Law before the American Bar Association in

Denver, August, 1901. The Senator lectured on the same subject before the Harvard Law School and was professor of mining law in the Denver Law School. He frequently appeared before the United States Supreme Court.

The Senator was counsel and successful in the Durant, Emma and Aspen litigation, which went far to settle the important apex law, the decision upon which was approved in the United States Supreme Court. Few great mining or irrigation suits in the Middle West or Rocky Mountain region have been tried in which Senator Hughes has not been a participant as a leading counsel.

Although always taking great personal interest in politics, Mr. Hughes declined to become a candidate for any office until he was indorsed in 1908 by the Democratic state convention for United States Senator and elected to that office by the next legislature. He had been, however, a Democratic presidential elector in 1900.

### Tennessee Judge Dies

Judge John M. Taylor, of the court of civil appeals, died on February 17th, at his home at Lexington, Tennessee. He was seventy-two years of age. His father was a Virginian, and his mother came from North Carolina and the judge was wont to boast that he was a son of Tennessee and a grandson of Virginia and the old North State. He fought for the cause of the South at Bowling Green and at Shiloh under General Johnston. At Perryville he was badly wounded, being shot through the thighs, and left on the battlefield for dead. He was crippled for life in this battle. A graduate of Cumberland University, of the class of '60, he resumed the practice of law at Lexington after the war. He was mayor in 1869, and was a delegate to the constitutional convention of 1870. He was attorney general of the eleventh judicial circuit eight years; a member of the legislature of 1881; member of the national Congress in 1882-84; Democratic elector in 1892; judge of the eleventh judicial circuit 1895-1900; and was in 1902 elected to the appellate bench, where he served until his death.

DANIEL W. Bond, justice of the superior court of Massachusetts, died at his home in Waltham on January 22d. He had not been ill long, for he presided over the recent trial of Hattie Le Blanc, in the famous Glover murder case. That was his last important judicial service.

DANIEL W. BOND

Judge Bond, in the Le Blanc trial, also had the distinction of trying the first murder case alone under the new law in Massachusetts, which reduced the number of presiding justices from two to one in capital cases.

Daniel W. Bond was born in Canterbury, Connecticut, on April 29, 1838. He spent his boyhood in his native town, working for farmers out of school terms, and attending the public schools in the winter season.

It was in 1862 that he received the degree of LL. B. from the Law School of Columbia University, and in the same year he was admitted to practise at the bar. From 1877 to 1889 he served as district attorney for the northwestern judicial district of Massachusetts, combining Hampden and Franklin counties.

It was in October, 1890, that he was appointed by Governor Brackett a justice of the superior court of the commonwealth, in which capacity he has presided at many trials of large public interest.

Judge Bond was an unconventional justice. He had large individuality, which at times might seem to be eccentricity. He was a hard-working, conscientious man, swerving, if at all, toward "the quality of mercy." He preferred to represent humanity, as well as the majesty of the law, though he could be as unyielding as a granite wall against what he believed to be trickery or unfair practices.

Rhode Island's Chief Justice

EDWARD C. DE BOIS

EDWARD Church Dubois, son of Edward and Emma (Davison) Church, was born in London, England, where his parents were then temporarily residing, January 12th, 1848. His father, a direct descendant of Colonel Benjamin Church, of Colonial and Indian war fame, the son of Edward and Marie (Dubois) Church, in the year 1857, being about to publish his second French grammar, having published his first, entitled, "Church's French Spoken" in the year 1844, concluded that a French name was desirable for the author of a French book, and assumed for himself and family the family name of his mother, Dubois, since retained by his children.

The subject of this sketch was educated at the Collegiate and Commercial Institute, familiarly known as Russell's Academy, New Haven, Connecticut, the High School at Pawtucket, Rhode Island, and at the Friends' Academy, New Bedford, Massachusetts. He studied law in Boston, Massachusetts, and was there admitted to the bar March 19, 1870. In 1872 he was appointed clerk of the police court in Haverhill, Massachusetts, which position he held until November, 1877, when he resigned the office and removed to Providence, Rhode Island. In May, 1878, he removed to East Providence, Rhode Island, where he has since resided. He has served as state representative and senator from that town, and was its town solicitor for several years. He was Attorney General of the state of Rhode Island from 1894 to 1897. He came upon the bench of the supreme court as an associate justice in March, 1899, and became chief justice in January, 1909.

Nevada's Chief Justice

JAMES G. SWEENEY

HONORABLE James G. Sweeney is a native of Carson City, Nevada. He is a graduate of the Carson High School, St. Mary's College, and Columbian University, Washington, District of Columbia. Judge Sweeney won his way upward in the face of difficulties. For years he worked in the Comstock mines, and while so employed occupied his leisure time in the study of law, and was admitted to the bar of his native state at the age of twenty-one years. Afterwards he continued working in the mines until he had earned sufficient funds to pay his way through the Columbian Law University, from which he graduated with high honors.

Himself a miner by occupation, it is easy to account for Judge Sweeney's interest in the welfare of the miners. The present eight-hour law for the miners of Nevada was secured largely through his efforts when in the legislature, and successfully defended by him when attorney general.

He has served Nevada in her legislative departments as representative from Ormsby county; in her executive department for four years as attorney general. At the time of his election as attorney general, Chief Justice Sweeney was but twenty-four years of age, being the youngest attorney general ever elected in the United States, and is probably the youngest Chief Justice of any court of last resort in the United States.

Politically, Judge Sweeney has served as chairman of the democratic party of Nevada and is a firm believer and advocate of the principles of the democratic party as enunciated by Jefferson.

Chief Justice Sweeney is now serving his fifth year on the supreme bench.

### Delaware's Chief Justice

JAMES PENNEWILL

"JAMES Pennewill, the son of Simeon and Annie E. Curry Pennewill," says Conrad's History of Delaware, "was born near Greenwood, Sussex county, Delaware, June 16, 1854. His father, like his grandfather before him, was a prosperous farmer in Sussex county. James Pennewill received his youthful education in the public schools of Greenwood and Bridgeville, and after spending three years at the academy of Professor William A. Reynolds, in Wilmington, Delaware, he entered Princeton University, from which institution he graduated in 1875. He immediately began reading law under the Honorable Nathaniel B. Smithers, and was duly admitted to the Delaware bar October 28, 1878." He began the practice of his profession in Dover, and so continued until June 14, 1897, at which time, under the reorganization of the Delaware judiciary pursuant to the new Constitution, he was made an associate justice of the supreme court. At one time during his practice he was associated with Honorable George V. Massey, and later with Honorable James L. Wolcott. While a justice of the supreme court, he was the official law reporter, and produced six volumes of Pennewill's Reports.

December 5, 1888, Mr. Pennewill was married, at Dover, to Alice, daughter of William G. and Temperance A. Hazel, of that town.

June 15, 1909, he was appointed Chief Justice of the Supreme Court of the State of Delaware, which position he still occupies.

Chief Justice Pennewill never held any political office, although at one time, before his appointment to the bench, he was chairman of the Republican committee of Kent county, and later he became chairman of the Republican state central committee. Four years ago, Judge Pennewill was his party's choice for United States Senator, and he would have been elected for a full term as Senator from Delaware had he consented to his selection.

### Oldest Member of Boston Bar Dies

Thomas H. Russell, of the law firm of Russell, Moore & Russell, the oldest member of the Boston bar, and the senior member, as well as a founder, of the Boston Bar Association, died on February 24th, in his nintey-first year.

Mr. Russell was born in Princeton, Massachusetts, in 1820. He was graduated from Harvard College with the class of 1843, and from the Harvard Law School two years later. With his brother, the late Charles T. Russell, he early formed a partnership which continued more than fifty years. Charles Theodore Russell, Jr., became a partner in 1875, as did his brother, the late William E. Russell, afterward Governor of Massachusetts, in 1880. Arthur H. Russell, son of Thomas H., was admitted to the firm in January, 1884.

After the death of his brother, Mr. Russell continued his practice as an advising lawyer until very recently. He had maintained his law offices continuously in the Brazer building on State street, of which he was a trustee, from 1845, or nearly sixty-six years, except during the time of its reconstruction.

For sixty years he had been connected with the Central Congregational Church. For many years he was on the board of visitors and afterward upon the board of trustees of the Andover Theological Seminary, and was actively concerned in the defense of the professors there at the time of the so-called "heresy trials."

Former Judge David Fowler, of the Maryland court of appeals, died suddenly in Baltimore on February 5th.

Judge Fowler was born in Washington county, Maryland, in 1836, and was the son of the late Robert Fowler, at one time

treasurer of Maryland. He was educated at the famous St. James College, near Hagerstown.

He was admitted to the Baltimore Bar in 1862. He received some of his inspiration in the law from two of the brightest minds at the Maryland bar,—Reverdy Johnson and Charles M. Gwinn, with both of whom he was associated as a young lawyer.

He was first elected associate judge of the third judicial circuit in November, 1882, and served in that capacity until August, 1889, when he was appointed chief judge by the late Governor Jackson. At the following general election, in November of the same year, he was elected for the full term of fifteen years, and when his term expired, in 1904, he was appointed by Governor Warfield to serve until the November election of 1905.

Judge Fowler's retirement from the court of appeals was due entirely to his proximity to the age limit,—seventy years—for no man stood higher in the estimation of the people of the state.

He was a survival of the old-school lawyer, solidly based in the classics, and obtaining his legal training in the office of a great law firm and in actual experience, he was one of the quickly passing "old guard' of the legal fraternity, to which the law school was a new development. Incidentally, Judge Fowler was one of the number of unusually brilliant young lawyers who were graduated by that famous old Baltimore firm, Brown & Brune.

## Brilliant Minnesota Judge and Author Called

Edwin A. Jaggard

THE death of Judge Jaggard, associate justice of the Minnesota supreme court, at Bermuda, February 13th, was a distinct loss to the state. He was a man of unusual legal and mental ability, conscientious and thorough, and his personality was charming. He took a broad view of legal questions, and his decisions were rendered only after great care and research.

He was born at Altoona, Pa. June 21, 1859, and took the bachelor of arts degree at Dickinson college in 1879, and master of arts in 1882. He took the LL.B. degree at the University of Pennsylvania in 1882, and the LL.D. degree was conferred upon him in 1906.

Justice Jaggard was a lecturer at the law school at the University of Minnesota, being a member of the faculty since 1892. He was district court judge of the second Minnesota district, and had been justice of the state supreme court since 1905.

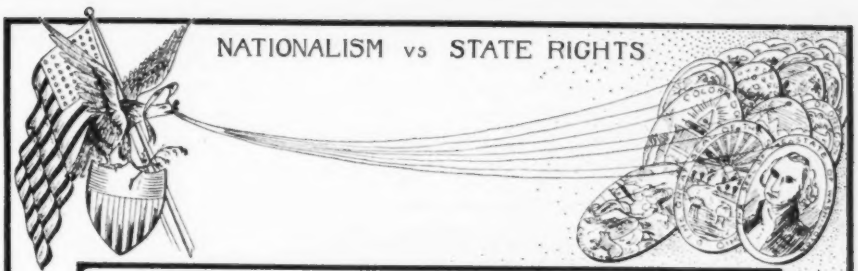
He was the author of several books on torts, taxation in North and South Dakota, taxation in Iowa, and also a history of the anomalies in the law of libel and slander, as well as articles and addresses on false imprisonment and on malicious prosecution.

Justice Jaggard was a very lovable man and an earnest student. He had read everything, and at a banquet or a social gathering could extemporize by the hour on almost any subject, and do so well enough to delight his hearers by the beauty of his ideas and amaze them by the wealth of his learning. Nothing apparently appealed to him so much as to stand before a gathering, and let his mind roam over some subject, allowing his hearers to follow the peculiar trend of his thoughts.

He was noted particularly for his fishing trips. When not making a tour in this or some other country, he spent his vacations in some secluded haunt that would have delighted Izaak Walton. There he rested from the heavy strain of his judicial duties. But these were also "thinking" trips. Some of his opinions were thought out amid leafy silences or on the broad reaches of some winding river.

One who knew him writes that "one Christmas time I desired to buy a copy of the Complete Angler, but found that Judge Jaggard had gone about and purchased every copy in the town for gifts to his friends. He usually gave two or three hundred remembrances of this kind, *i. e.*, books."

Although his opinions, which sometimes partook of metaphysical or psychological inquiries into the reasons of the law, evoked criticism from lawyers who could not appreciate such a departure from the conventional pattern, they may confidently be said to have been well written, accurate, and exhaustive.




# The Humorous Side

"E'en grim-visaged Law can smooth his wrinkled front and smile."

**A Bad Trio.**— An old offender was recently introduced to a new county justice as "John Timmins, alias Jones, alias Smith." "I'll try the two women first," said the justice. "Bring in Alice Jones."

**The Surest Place.**—Speaker (warming to his subject)—"What we want is men with convictions, and where shall we find them?"

Voice—"In jail, guv'nor!"—Penny Illustrated Paper.

**Here Below.**— Edward Douglas White, of Louisiana, Chief Justice of the United States Supreme Court, said at a luncheon given in his honor in Washington, that corporate and political corruption will only be stopped when convictions mean ignominy and disgrace.

"At present," said Judge White, "I am afraid that convictions and fines are regarded too lightly by the big financiers of the sinning type. They remind me of John Booth, of Lafourche.

"John Booth, an old offender, was haled before a magistrate, who said to him sternly:

"'I see by your record, Mr. Booth, that you have had thirty-seven previous convictions. What have you to say?'

"Booth, assuming a sanctimonious air, replied:

"'Well, judge, man is not perfect,'"
—Minneapolis Journal.

**An Omitted Question.**— A lawyer tells a story of an accident at a railway crossing at night, in which a farmer's cart was struck and demolished and the farmer injured, says London Tit-Bits.

"I was counsel for the railway," says the lawyer, "and I won the case for the defense mainly on account of the testimony of an old colored man, who was stationed at the crossing. When asked if he had swung his lantern as a warning, the old man swore positively:

"'I surely did.'

"After I had won the case I called on the old negro," said the lawyer, "and complimented him upon his testimony." He said:

"'Thankee, Marse Jawn, I got along all right; but I was awfully scared, 'cause I was 'fraid dat lawyer man was goin' ter ask me was my lantern lit. De oil done give out befo' de accident.'"

**A Prodigal Testator.**— An elderly gentleman, who knew something of law, lived in an Irish village where no lawyers had ever penetrated, and was in the habit of making the wills of his neighbors. At an early hour one morning he was aroused from his slumber by a knocking at his gate, and, putting his head out of the window, he asked who was there. "It's me, your honor—Paddy Flaherty. I could not get a wink of sleep, thinking of the will I have made." "What's the matter with the will?" asked the lawyer. "Matter indeed!" replied Pat. "Shure, I've not left myself a three-legged stool to sit upon."—Argonaut.

**Ex Post Facto.**— Attorney General Wickersham was talking at the Lawyers' Club in New York about some of the absurd defenses that are set up in cases wherein rich young men are involved.

"Such defenses seem to indicate," he said "that some lawyers deem the public as ignorant of common law and common sense as Calhoun White was.

"Calhoun White was a southern lawyer, and once, in a case in a South Carolina court, he made frequent references to 'de ex-facto-posthole,' law.

"The judge, with a quiet smile, at last set him right.

"You mean, Mr. White,' he said, 'the ex-post-facto law.'

"But Calhoun White drew himself up with dignity.

" 'Ah begs pawdon ob de co't,' he said, in a pitying voice, but yo' honah sartinly am lame on dat ar term. Why, gents, hit am dat law wot perhibits a man from diggin' de hole arter de post am set.' "—Exchange.

**He Had no Choice.**—"You say you were in a saloon at the time the alleged assault took place?" a lawyer inquired of a witness at the central station the other day.

"Yes, sir, I was," the witness admitted.

"H'm," the lawyer pursued, "that is interesting. And did you take cognizance of the barkeeper at the time?"

"I don't know what he called it, sir," came the reply, with perfect ease, "but I took what the rest did."—Philadelphia Times.

**Vocation and Avocation.**— An attorney who was also secretary of a gas company was considerably amused at the remark of his little five-year-old daughter who told a gentleman in response to his query as to what her father did for a living, that "my father is a lawyer and sells gas."

**Scorching the Lawyers.**—Senator William Fiero, of Catskill, was seated about the enormous fireplace in Keeler's Hotel the other night when he told this story:

"I remember thirty years ago, when I was a lawyer, there were about fifteen or eighteen of us—all lawyers—seated about a fireplace much like this. It was a raw, wet night. A bedraggled stranger, wet to the hide, came in, tried to get accommodations, and was told there was not a room left. The nearest other place was a mile away. Shivering, the stranger looked at the fire, but we formed such a solid line about it that he could not get near it. Finally one of the lawyers, in a spirit of frivolity, turned to him and said:

" 'My friend, are you a traveler?'

" 'I am sir. I have been all over the world."

" 'You don't say! Been in Germany, Egypt, Japan and all the countries in Africa and Asia?'

" 'All of them; been everywhere.'

" 'Ever been in hell?'

" 'Oh, yes; been there twice.'

" 'How did you find things there?'

" 'Oh, much the same as here—lawyers all next to the fire.' "—New York World.

**One Thing He Would Not Do.**—He was a county judge, old, bewhiskered, and full of dignity.

"The integrity of the bench, Sam," he said one summer afternoon, "must be upheld. I and my fellows on the bench throughout the country hold now, and have always held, that no personal friendship, no inducement can sway our minds when there is a question of making a decision."

Sam bared his very high brow to the cooling breeze, and hitched his chair a little closer to that of the upright judge.

"What would you do, judge," he asked, "if somebody offered you $100,000 to throw a case the wrong way?"

The judge hesitated and glanced around in a casual manner to see that nobody was within earshot.

"Well, Sam," he said at last. "I wouldn't go too far to make that decision. There's one thing I wouldn't do. I would not shed blood. Of course, anything else—"

Thus was another blow struck at integrity.—Popular Magazine.

**Between Lawyers.**— "I won't defend a man whom I believe to be guilty."

"My boy, you musn't set your judgment up against that of the majority. I have defended plenty of men whom I believed to be guilty, but the jury decided otherwise."—Louisville Courier-Journal.

# Trial By Jury

The picture on the next page represents the artist's conception of the first trial by jury. It is the work of Charles W. Cope, the famous English historical painter, who was born in 1811 and died in 1890. He executed eight frescoes from English history for the House of Lords. In 1843 he received £300 for his painting, "The First Trial by Jury."

The system of trial by jury is so ancient that "its origin loses itself in the night of time." Shakespeare may be within the bounds of truth when he declares: "They have been grand jurymen since before Noah was a sailor."

Perhaps no single political institution has been so highly lauded. Lord Brougham remarked: "In my mind, he was guilty of no error, he was chargeable with no exaggeration, he was betrayed by his fancy into no metaphor, who once said that all we see about us, kings, lords, and commons, the whole machinery of the State, all the apparatus of the system, and its varied workings, end in simply bringing twelve good men into a box." President Taft said in a recent address: "We cannot, of course, dispense with the jury system. It is that which makes the people a part of the administration of justice."

Poets and authors, however, have not hesitated to criticize the jury, along with all things mundane.

> The jury, passing on the prisoner's life,
> May in the sworn twelve have a thief or two
> Guiltier than him they try.—Shakespeare.

> The hungry judges soon the sentence sign,
> And wretches hang that jurymen may dine.—Pope.

> Wilt make haste to give up thy verdict because
> thou wilt not lose thy dinner.—Middleton.

If it's near dinner time, the foreman takes out his watch when the jury have retired and says: "Dear me, gentlemen, 10 minutes to 5, I declare! I dine at 5, gentlemen." "So do I," says everybody else except two men who ought to have dined at 3, and seem more than half disposed to stand out in consequence. The foreman smiles, and puts up his watch: "Well, gentlemen, what do we say? Plaintiff, defendant, gentlemen, I rather think so far as I am concerned, gentlemen—I say I rather think—but don't let that influence you—I rather think the plaintiff's the man." Upon this two or three other men are sure to say they think so too—as of course they do; and then they get on very unanimously and comfortably.—Dickens.

Here is a fitting conclusion:

> For twelve honest men have decided the cause,
> Who are judges alike of the facts and the laws.—Wm. Pulteney.